Supreme Court of the United States.

OCTOBER TERM, 1901.

MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of JAMES B. MONTGOMERY, Deceased, Plaintiff in Error,

vs.

THE CITY OF PORTLAND and THE PORT OF PORTLAND, Defendants in Error.

No. 253.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

Brief and Argument on the Part of the Plaintiff in Error.

Statement of Case.

This is a suit brought originally in the Circuit Court of the State of Oregon for the County of Multnomah, by the City of Portland and the Port of Portland, plaintiffs, respondents herein, against James B. Montgomery, in his lifetime, as defendant for the purpose of enjoining the defendant Montgomery, his attorneys, agents,

servants, and employees from driving piles or putting any other obstructions in the Willamette River outside of what was alleged to be a certain wharf line theretofore established by the City of Portland, a municipal corporation, with the view to the construction of a wharf, and praying that a decree and order may be made and entered directing and commanding the said Montgomery, his agents, servants, and employees to remove from said Willamette River all piles driven, or structures of any description made or put in said river outside of said alleged wharf lines in the construction of said wharf, and for such other and further relief as is meet with equity and good conscience, and for judgment for costs and disbursements.

The facts upon which this claim for relief is based are to be found in the bill of complaint. (Record, 16–20.)

To this complaint the defendant Montgomery interposed an answer. (Record, 21–30.)

To this answer the plaintiffs interposed a motion to strike out portions of the same (Record, 1–3); and at the same time plaintiffs also interposed a demurrer to that portion of said answer setting up the action of the Secretary of War on the 23d day of September, 1898, for the reason that the same does not state facts sufficient to constitute any defense to this suit. (Record, 32.)

Subsequently, on the 11th day of February, 1899, said Circuit Court made and filed Findings of Fact and Conclusions of Law in said suit as are set out in *hace verbae* (Record, 32–43); and on the same day said Circuit Court, in accordance with the Findings of Fact and Conclusions of Law hereinbefore referred to, ordered, adjudged, and decreed that the bill of complaint of the plaintiffs filed therein by said City of Portland and Port of Portland, be dismissed, and that the defendant, James B. Montgomery, have and recover of and from the

plaintiffs his costs and disbursements to be taxed, and that execution issue therefor. (Record, 43.)

From this decree the plaintiffs in the court below prosecuted an appeal to the Supreme Court of the State of Oregon, and assigned for error the following:

1. The court below erred in overruling appellants' motion to strike out parts of respondent's answer.

2. Said court erred in overruling appellants' demurrer to respondent's answer.

3. Said court erred in holding that section 12 of the act of Congress of 1890 (27 Rev. Statutes, 88) is constitutional.

4. Said court erred in holding that the Secretary of War had any right in 1898 to change harbor lines that were established in 1892.

5. Said court erred in holding that the facts, as they appeared in the pleadings and evidence, gave the Secretary of War or G. D. Meiklejohn any jurisdiction to fix or interfere with the harbor lines within the city of Portland.

6. Said court erred in holding that respondent had any right to drive piles or extend his wharf beyond the wharf line established by the city of Portland.

7. Said court erred in holding that the port of Portland had no right to interfere with or control the driving of piles or the building of a wharf by respondent in the Willamette River.

8. Said court erred in its first conclusion of law in holding that the red line indicated on the map "Exhibit A," was legally established, and is the only proper

or legal harbor line at the point indicated in said conclusion of law.

9. The court erred in its second conclusion of law in each and every particular as therein stated.

10. The court erred in its third conclusion of law in each and every particular as therein stated.

11. The court erred in dismissing appellants' complaint and awarding costs and disbursements against them.

(Record, 44).

On March 3, 1899, it was stipulated by the attorneys for the respective parties that the "Appellants' Abstract of Record" should be considered and treated in the Supreme Court of the State, as the transcript of record in the case, and the filing of any other or further transcript was waived. (Record, 44.)

Subsequently, April 13, 1899, appellants filed in said Supreme Court a brief and argument in support of their various contentions. (Record, 45–62.)

The respondent, James B. Montgomery, having deceased, his executrix, Mary Phelps Montgomery, was substituted upon the record. (Record, —.)

Subsequently, March 4, 1899, appellants filed their "Abstract of Record" in the Supreme Court of the State. (Record, 15–44.)

Subsequently, the defendant Montgomery filed a brief and argument in the Supreme Court of the State of Oregon, in support of the decree of the Circuit Court. (Record, 63–158.)

To this brief and argument the attention of this court is respectfully attracted.

On April 29, 1899, the appellants, by their attorneys,

filed their reply brief upon the part of the appellants. (Record, 158–167.)

The case coming on for hearing in the Supreme Court of the State, said court on the 19th day of November, 1900, rendered a decree therein reversing the decree of the Circuit Court, and holding—

1. That the findings of fact by the court below were substantially correct and supported by the evidence therein, and that the same were adopted as the findings of fact of said Supreme Court, and as conclusions of law therefrom said Supreme Court of the State found as follows:

(1) That the wharf lines established by the appellant, the city of Portland, on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the port of Portland.

(2) That the respondent had no right to drive piles or extend his wharf beyond the wharf lines so established by the appellant, the said city of Portland.

(3) That the respondent, her attorneys, agents, servants, and employees, should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf line with a view to the construction of said, or any wharf, and that the appellants should have a decree directing and commanding respondent, her agents, servants, and employees, to remove all said piles driven, or structures of any kind made or put therein, outside of said wharf lines in the construction of said wharf.

And it was further ordered, adjudged, and decreed by said Supreme Court as follows:

"That the respondent Montgomery, her agents, ser-

vants, and employees, be, and they are hereby, enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf lines, with a view to the construction of said or any wharf, and the said respondent, her agents, servants, and employees are hereby directed and commanded to remove from said river all piles driven, or structures of any description made or put in said river, outside of said wharf lines in the construction of said wharf."

And it was further ordered and decreed by said Supreme Court of the State as follows:

"That the appellants recover of respondent, their costs and disbursements in this court upon the appeal, allowed and taxed at $141.90, and their costs and disbursements in the court below to be there taxed."

And it was further ordered—

"That the cause be remanded to said court below and that a decree be there entered and docketed in accordance herewith."

(Record, 167–168.)

And said Supreme Court of the State also filed an opinion therein on the same day. (Record, 169–176.)

Subsequently, January 17, 1901, the respondent in the court below, and plaintiff in error herein, filed in said Supreme Court of the State of Oregon, a petition for an order granting a writ of error to the Supreme Court of the United States (Record, 176–182), which petition was granted, and also filed her undertaking on writ of error to said Supreme Court of the United States (Record, 182), and citation was duly issued. (Record, 184.)

The appeal having been perfected, the parties plaintiffs and defendant in error by their respective attorneys, entered into a stipulation as follows:

"Stipulation in reference to transcript and papers for the Supreme Court of the United States.

"It is hereby stipulated and agreed by and between the attorneys of the respective parties, plaintiffs in error and defendant in error, that the following original papers in addition to the regular transcript of the record, required by law, shall be forwarded to the clerk of the Supreme Court of the United States by the clerk of the Supreme Court of the State of Oregon, and all of which original papers shall be considered in the argument and decision of this cause in the Supreme Court of the United States, to wit:

FIRST. The original stipulation, signed by the attorneys of the respective parties and dated March 3, 1899, including the printed document marked "Exhibit A" attached thereto, and entitled "Appellants' Abstract of Record" and also the original map marked "Exhibit B" attached to and made a part of the answer of the defendant Montgomery, together with the endorsements thereon and certificates attached thereto, and which original map is attached to said stipulation, and which stipulation was filed in the Supreme Court of the State of Oregon, March 4, 1899, and all of which were transmitted to the Supreme Court of the State of Oregon, to be considered on the trial of this cause.

"SECOND. The original map entitled "Harbor line, Portland, Oregon, Randolph Street to Russell Street, Survey August 6–13, 1898," which map was used as evidence on the trial of this cause and is now on file with the clerk of the Supreme Court of the State of Oregon.

"THIRD. The annual report of Engineer Hanbury, filed in the Supreme Court of the State of Oregon on March 4, 1899.

"FOURTH. The affidavit of John McCraken, dated December 16, 1898, and filed in the Supreme Court of the State of Oregon on March 4, 1899.

"FIFTH. The certified copies of papers of John M. Wilson, Brigadier General, Chief Engineer, U. S. A., filed in the Supreme Court of the State of Oregon, March 4, 1899.

"SIXTH. The affidavit of James B. Montgomery, made December 15, 1898, and filed in the Supreme Court of the State of Oregon March 4, 1899.

"SEVENTH. The stipulation signed by the attorneys of the respective parties, filed in the Circuit Court December 17, 1898, and in the Supreme Court March 4, 1899, to the effect that the local engineer at Portland, Oregon, after hearing had reported against Montgomery.

"EIGHTH. The six letters, dates respectively June 2, 1898, August 17, 1898, August 2, 1898, September 22, 1898, October 7, 1898, and November 28, 1898, all attached together and filed in the Circuit Court on February 1, 1899, and in the Supreme Court on March 4, 1899.

"NINTH. The stipulation signed by the attorneys of the respective parties, filed in the Circuit Court December 9, 1898, and in the Supreme Court March 4, 1899, and to the effect that the preamble and resolutions set out in subdivision VII of the bill of complaint, were on November 2, 1898, by the Board of Commissioners of the port of Portland adopted by said board."

(Record, 191–192.)

Which stipulation was duly filed in said cause in said Supreme Court of the State February 7, 1901. (Record, 192.)

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

"Now at this time comes Mary Phelps Montgomery, executrix of the last will and testament of James B. Montgomery, deceased, substituted for James B. Montgomery, defendant and respondent, in the above entit-

led case, and plaintiff in error to the Supreme Court of the United States, by her attorneys Stott, Boise and Stout and Mitchell & Tanner, and presents the following assignment of errors and prayer for reversal of the decision in the above entitled case in this court, by the Supreme Court of the United States:

"FIRST. The Supreme Court of the State of Oregon erred in holding that there was error in the decision and record of the court below, and in reversing the decree of said Circuit Court.

"SECOND. The Supreme Court of the State of Oregon erred in holding that the wharf lines established by the appellant, the city of Portland, on the 12th day of December, 1892, were then and ever since have been the legal and authorized wharf lines of the port of Portland.

"THIRD. The court erred in holding that the respondent had no right to drive piles or extend his wharf beyond the wharf line so held to have been established by the appellant, the city of Portland.

"FOURTH. The court erred in holding that the respondent, her attorneys, agents, servants and employees should be enjoined and restrained from driving piles or putting any structure in said river outside of said wharf lines, with a view to the construction of said or any wharf, and in holding that the appellants should have a decree directing and commanding respondent, her agents, servants and employees, to remove all said piles driven or structures of any description made or put therein outside of said wharf lines in the construction of said wharf.

"FIFTH. The court erred in holding and decreeing that the respondent, her agents, servants and employees, should be enjoined and restrained from driving piles or putting any other structures in said river outside of said wharf lines with a view to the construction of said wharf, and in directing and commanding respondent, her agents, servants and employees, to remove from said river all piles driven or structures of any description made or put in said river outside of said wharf lines in the construction of said wharf.

"SIXTH. The court erred in holding that the act of the legislature of the State of Oregon, and the 27th section of the 16th subdivision thereof, to wit, an act entitled "An Act to incorporate the City of Portland," which act became operative by being filed in the office of the Secretary of State of the State of Oregon, February 19, 1891, and which subdivision under the head of 'Chapter VII,' 'of the organization and power of the council,' reads as follows: '16. To regulate the building of wharves and the driving of piles in the Willamette and Columbia rivers within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles driven' (Session Laws of 1891, page 805), was not repugnant, as claimed by the respondent Montgomery, to that paragraph of section eight of article one of the Constitution of the United States, which provides as follows: 'To regulate commerce with foreign nations and among the several States and with the Indian tribes,' and said court erred in holding that said statute of the State of Oregon was not repugnant to the twelfth section of the act of Congress entitled, 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors and for other purposes,' approved September 19, 1890, as claimed by respondent Montgomery; and said court erred in holding that said act of the legislature, hereinbefore referred to, was not repugnant, as claimed by the respondent Montgomery, to the seventh section of said act of Congress hereinbefore referred to, and said court erred in holding that the right and privilege, claimed by the respondent Montgomery, to construct his wharf at the place and where it is constructed, in virtue of said provision of the Constitution of the United States and of said act of Congress hereinbefore described, and of the act of the Secretary of War, in establishing harbor lines and in re-establishing the same in the harbor of the city of Portland, Oregon, and in granting to the respondent Montgomery, the privilege to extend his wharf beyond the harbor line as originally established, was not a valid claim or privilege upon the part of the respondent; and that the

same involve Federal questions, and the decision of all of which by this court were against respondent and to her prejudice.

"SEVENTH. The court erred in holding that the ordinance of the common council of the city of Portland, approved December 12th, 1892 (Ordinance No, 7995), entitled "An ordinance establishing a wharf line on the city front," and section one and three thereof, were not repugnant to the clause of the Constitution of the United States hereinbefore cited, and to sections seven and twelve of the act of Congress hereinbefore cited and to the authority of the Secretary of War exercised thereunder establishing harbor lines, as claimed by respondent in this case.

"EIGHTH. The court erred in holding that the act of the legislature of the State of Oregon, entitled "An act establishing and incorporating the port of Portland and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea," approved February 18, 1891 (Session Laws of 1891, page 791), and which act is cited and in part set out in the bill of complaint in this case, and under and in pursuance of which the appellant in this court claimed certain rights, was not in conflict with and repugnant to the provisions of the Constitution of the United States hereinbefore cited, and in holding that it was not in conflict with and repugnant to the provisions of the act of Congress hereinbefore cited, and in holding that it was not in conflict with and repugnant to the authority exercised by the Secretary of War, under said clause of the Constitution of the United States and said act of Congress, in establishing the harbor lines in the Willamette river in the harbor of the city of Portland, Oregon."

"NINTH. The court erred in holding that the respondent Montgomery did not have the right to construct his wharf at the place and in the manner he was constructing the same at the commencement of the suit, and at the place and in the manner in which he admits he was constructing the same in the answer filed in this suit.

"TENTH. The court erred in holding that the defendant should pay the costs of this appeal.

"Wherefore, respondent prays, for the reasons hereinbefore assigned, that this case be reversed, and the decree of the Circuit Court affirmed."

(Record, 185–187.)

The Pleadings.

The facts stated in the bill of complaint are insufficient to constitute a cause of suit.

I.

The bill of complaint does not state facts sufficient to constitute a cause of suit in this, that there is no proper averment, either that the wharf being constructed by the respondent, Montgomery, is or ever will be an obstruction whatever to the navigation, or other use of the harbor, or that such wharf is or ever will be a public nuisance, or that its construction as proposed will in any manner, or to any extent, interfere with the work of the port of Portland in improving such harbor.

Bill of Complaint, Appellant's Abstract of Record, 1–9. (Record, 16–20.)

The objection that the complaint does not state facts sufficient to constitute a cause of suit is not waived by failure to demur, and this objection may be taken advantage of in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.

Brown *vs.* Emerson, 3 Oregon, 452.

Evarts *vs.* Steger, 5 Oregon, 147.

Mack *vs.* Salem, 6 Oregon, 275.

Olds *vs.* Carey, 13 Oregon, 362.

Caldwell *vs.* Ruddy, 1 Idaho, N. S., 760.

Willits *vs.* Walter, 32 Oregon, 411.

II.

The court below had no jurisdiction of this cause, for the reason that the bill of complaint does not state facts sufficient to confer jurisdiction upon a court of equity. The court below, therefore, did not err in dismissing appellant's bill, and this objection is not waived by failure to demur.

Hill's Annotated Laws, vol. 1, sec. 71, p. 210, and authorities *supra*.

III.

The defendant, plaintiff in error here, was entitled to judgment on the pleadings, dismissing the plaintiff's bill of complaint for the reason no replication whatever was filed by the plaintiffs to the further and separate answer of the defendant setting up new matter.

Appellant's Abstract of Record, 17–26. (Record, 63–64.)

Therefore all the material averments in such separate answer must be taken as admitted by the plaintiffs to be true, and these admissions entitle the defendant to a decree dismissing the plaintiff's bill.

The controversy presented for the oonsideration and determination of this court in this case has relation to a conflict of jurisdiction between the Federal and State authorities in the matter of the establishing of harbor lines in one of the navigable harbors of the United States. It is asserted upon the part of the plaintiff in error and the defendant in the court below that a harbor line established by the Secretary of War, in pursuance of the authority asserted by section 12 of the River and Harbor Act of September 19, 1890 (26th Statutes at Large, pages 454–455), must stand as the harbor line in such harbor, and any wharf lines established by the State in such harbor, by the municipality under authority from the

State, must not conflict with the harbor lines so established by the Secretary of War, and if there is a conflict, then the act of the State must yield to that of the Federal Government. In other words, if the Federal Government, through the Secretary of War, establish a harbor line, designating a line inside of which vessels shall not be permitted to go to receive cargoes, then in such case the State, or the municipality acting under authority from the State, shall not be permitted to establish a wharf line in such harbor inside of the harbor lines so established by the Secretary of War, and outside of which wharves shall not be built. Thus establishing a line, as in this case, of some eighty-five feet at one point between the harbor line beyond which *inside* ships shall not be permitted to go, and the wharf line, *outside* of which wharves shall not be permitted to be built. To state the matter differently, Congress, in the exercise of the commercial power of the Constitution, defines the line inside of which, or landward, the ships of commerce shall not be permitted to go, and yet, according to the contention of our adversary in this case, the State can step in and nullify the whole business by fixing a line distant *inside* of the harbor line so established, of 50 or 100 or 200 feet *outside* of which wharves shall not be permitted, the effect of which would be the destruction of commerce in such harbors. In such a condition the vessel and the wharf could never meet. The cargo, to reach the ship, would necessarily have to be transported across an intervening body of water—separating the ship from the wharf.

Points and Authorities on Merits.

I.

By article 1, section 8, clause 3, of the Constitution of the United States, a grant of power is given to the Con-

gress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

This clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States, leaves to the States, IN THE ABSENCE OF CONGRESSIONAL LEGISLATION, the power to regulate matters of *local* interest, which affect INTERNATIONAL AND INTERSTATE commerce only INCIDENTALLY; but the power of Congress over COMMERCE WITH FOREIGN NATIONS and interstate commerce is EXCLUSIVE whenever the matter is NATIONAL IN CHARACTER, and admits of a uniform system or plan of regulation.

In other words, as to those subjects of commerce which are *local* or *limited* in their nature or sphere of operation, such as the erection of bridges, the establishment of harbor lines in harbors, etc., the city may prescribe regulations, *until Congress assumes control of them*, but as to such as are *national in their character*, and *require uniformity of regulation*, the power of Congress is exclusive, and until Congress acts such commerce is entitled to be free from State regulation, exactions and burdens.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Brown *vs.* State of Maryland, 12 Wheat., 419.
Wheeling Bridge Case, 13 How., 421.
Gillman *vs.* Philadelphia, 3 Wall., 713.
Cannon *vs.* New Orleans, 20 Wall., 577.
Wisconsin *vs.* Duluth, 96 U. S., 388.
Turner *vs.* Maryland, 107 U. S., 38.
South Carolina *vs.* Georgia, 93 U. S., 4.
Transportation Co. *vs.* Parkersburg, 107 U. S., 691.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 624.

Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455.

U. S. *vs.* Duluth, 25 Fed. Cases, 925.

Ouchita Packing Co. *vs.* Aiken, 121 U. S., 444.

Gould on Waters, sec. 138, page 254.

Lawton *vs.* Steele, 152 U. S., 137.

Covington *vs.* Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204.

II.

The establishment of harbor lines in the navigable waters of the United States by Congress is an exercise of the constitutional grant of power to regulate commerce with foreign nations and among the several States, and although the State, or a municipality acting under authority from the State, may, *in the absence of any action by Congress*, establish such harbor lines, such action relating to a subject of *local* interest, and which affects international and interstate commerce only *incidentally*, yet, whenever Congress acts, then the power of the State is at an end, and if any conflict exist between the lines established by the national and State governments respectively, those of the State must give way to those established by the General Government.

Same authorities as above.

III.

Congress has jurisdiction, in the exercise of its power to regulate commerce, over the navigable waters of a river lying wholly within the limits of a single State.

Gibbons *vs.* Ogden, 9 Wheaton, 1.

Veasie *vs.* Moor, 14 How., 568.

Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.

Sillman *vs.* Hudson River Bridge Co., 2 Wall., 403.
Gillman *vs.* Philadelphia, 3 Wall., 713.
The Passaic Bridges, 3 Wall., 782.
Pound *vs.* Turke, 95 U. S., 459.
Brown *vs.* Houston, 114 U. S., 622.
Glocester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
And authorities *supra*.

IV.

The action of Congress in enacting sections 7 and 12 of the river and harbor act of September 19, 1890 (26 Statutes at Large, pages 454–455), conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and said sections are constitutional.

Wayman *vs.* Southard, 10 Wheaton, 1–43.
Cooley's Constitutional Limitations, 137.
Sutherland on Statutory Construction, sec. 68.
U. S. *vs.* Eliason, 16 Peters, 291.
The Gratiot *vs.* U. S., 4 How., 80.
Smith *vs.* Whitney, 116 U. S., 167.
Tilley *vs.* R. R. Co., 5 Fed. Rep., 641.
R. R. Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
U. S. *vs.* Ormsbee, district court, southern district of Wisconsin, May 9, 1896, 74 Fed. Rep., 209.
Field *vs.* Clarke, 143 U. S., 649–693.
Locke's Appeal, 72 Penn. St., 491.
South Carolina *vs.* Georgia, 93 U. S., 13.
Miller *vs.* Mayor of New York, 109 U. S., 385.
U. S. *vs.* City of Moline, U. S. district court, northern district of Illinois, 82 Fed. Rep., 596.
U. S. *vs.* North Bloomfield Gravel Mining Co., U. S. circuit court, northern district of California, 81 Fed. Rep., 253.

State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Stone *vs.* Trust Co., 116 U. S., 307.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 157.
Fallbrook *vs.* Irg. Dist. *vs.* Bradley, 164 U. S.
State *vs.* Gerhardt, 145 Ind., 439,
Sec. 12, deficiency act, March 9th, 1891, 26 U. S. Stat., pages 800–868.
Sec. 4, river and harbor act, Aug. 17th, 1894, Supp. Rev. Stat. U. S., vol. 2, page 250.
The People of Illinois *vs.* The Illinois Central R. R. Co., 91 Fed. Rep., 955.

V.

The power conferred on the Secretary of War by sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, is *plenary* and the enactment of those sections by Congress was a full exercise of all the constitutional power possessed by Congress in reference to the establishment of harbor lines, while the other portions of the act, relating to bridges, was only a *partial* exercise of the power exercised by Congress; therefore the two pieces of legislation, relating to the two different subjects, although all in the same act, are radically different in both purpose and scope, and the correct interpretation and application of the one—that is, that portion of the act relating to *bridges*, as considered and interpreted in the case of the Lake Shore and Michigan Railway Company *vs.* The State of Ohio, 165 U. S., 365, can have no legitimate bearing in the interpretation and application of sections 7 and 12 relating *solely* to the establishment of *harbor* lines. Sections 4 and 5 and a part of section 7 of the river and harbor act of September 19, 1890, relate to *bridges* (26 Statutes at Large, pages 426–453); while section 12 and a part of

section 7, same act, relate *solely* to the establishment of *harbor lines*.

26 Statutes at Large, 426–453.
Act Sept. 19, 1890, 26 U. S. Stat., 453–455.
Lake Shore & Michigan Railway Co. *vs.* State of Ohio, 165 U. S., 365.

VI.

The act of G. D. Meiklejohn, Secretary of War, is the act of the Secretary of War.

U. S. Rev. Stat., sec. 177, page 28.
Sup. U. S. Stat., vol. 1, 2d ed., page 707.

VII.

The power given to the Secretary of War by section 12 of the act of September 19, 1890, *supra*, to establish harbor lines, implies necessarily the power to modify, change or create anew.

United States *vs.* The Eliason, 16 Peters, 291.
United States *vs.* Romard, 89 Fed. Rep., 157.

VIII.

The facts, as presented by the pleadings and evidence, conferred jurisdiction on the Secretary of War to relocate and re-establish the harbor line in the manner the same was relocated and re-established by him September 23, 1898.

Numbers sixth, seventh and eighth of the findings of fact. (Abstract of Record, 35–43.) (Record, 35–40.)

IX.

The harbor lines caused to be established by the Secretary of War in front of the property of the respondent, Montgomery, August 9, 1892, was on proper application

changed and re-established by the Secretary of War, September 23, 1898.

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.)

Sec. 12 act Sept. 19, 1890; 26 Stat., 455. (Record, 25–29.)

X.

Although it should be conceded that the Secretary of War is without power to change or re-establish a harbor line previously established by him, as contended for by counsel for appellants, it is clear beyond question he had by virtue of sections 7 and 12 of the river and harbor act of September 19, 1890, *supra*, power to grant a permission to the respondent, Montgomery, to extend his wharf outside the harbor line established August 9, 1892, and having on proper application done so, neither the State of Oregon, city of Portland, nor the port of Portland, had any right or power to prevent it.

Sections 7 and 12, river and harbor act September 19, 1890. (26 Statutes at Large, 426–453.)

Numbers sixth, seventh and eighth findings of fact. (Abstract of Record, 35–43.) (Record, 35–40.)

XI.

The wharf being constructed by respondent is located on lands bordering on the navigable waters of the Willamette river in Portland harbor, within the limits of the city of Portland, the fee of which is in the respondent, James B. Montgomery.

Paragraph VII, bill of complaint. Abstract of Record, 5 and 6. (Record, 18–19.)

Answer, paragraph VI, Abstract of Record, 14. (Record, 23.)

Also separate answer, paragraph I. Abstract of Record, 24. (Record, 257.)

Also fifth finding of fact, Abstract of Record, 35. (Record, 97.)

XII.

The riparian owner in Oregon, in the absence of restrictive legislation, has the right by the *common law* to connect his shore line by means of wharves, piers or docks constructed over the shoal or shallow waters immediately bordering upon his land with the waters *which are navigable in fact.*

This he has the right to do not only in his own interest as a riparian proprietor, but as well also in the interest of the public, and of national and interstate commerce.

Railway Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, 1 Black, 23.

XIII.

But in the State of Oregon there is added to this common-law right of the riparian owner, *supra*, an *express grant from the State.* Section 4227, act of 1862, Hill's Code, which authorizes the owner of any land in Oregon lying upon any navigable stream, within the corporate limits of any incorporated town, to construct a wharf or wharves upon the same, and to extend such wharf or wharves into such stream beyond the low-water mark "*so far as may be necessary and convenient for the use and accommodation of ships*, or other boats or vessels that may or can navigate such stream."

Act of 1862, Hill's Code, sec. 4227.

XIV.

The question as to what constitutes a public nuisance must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in a summary mode and enforce its decree at its own pleasure. Whether a bridge or a pier is a public nuisance or not, whether the same is an obstruction to navigation and commerce or not, is a *question of fact*, and no simple declaration of a municipality can determine the question.

Dutton *vs.* Strong, 1 Black, 32.
Yates *vs.* Milwaukee, 10 Wall., 504.
Angell on Tide Waters, 196.
West Hartford *vs.* Hartford Water Co., 68 Conn., 323, 36 Atlanta Rep., 786.
Milne *vs.* Davidson, 16 Am. Dec., 195.
Cooley on Court Limitations, 6th ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Railroad Co. *vs.* Joliet, 79 Ill., 44.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Mun. Corp., 4th ed., sec. 800.
Grossman *vs.* City of Oakland, 30 Oregon, 478.

XV.

The provision of the city charter conferring power on the city of Portland, "to regulate the building of wharves and the driving of piles in the Willamette river within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles be driven" (bill of complaint, Abstract of Record 2), does not authorize it to declare by a special ordinance that a private wharf is an obstruction to navigation and a public

nuisance, *if in point of fact* it is not such obstruction or a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Smith *vs.* Minto, 30 Oregon, 353.
Grossman *vs.* City of Oakland, 30 Oregon, 478.
And authorities *supra*.

XVI.

Conceding the right of both the city of Portland and the port of Portland, as claimed by appellants, to establish *wharf lines* in the harbor of the city of Portland, it is respectfully submitted that any action taken by the respondents in that regard in order to have any binding effect whatever, must be *reasonable* and we submit that the location of the line by the city of Portland, and by the port of Portland, as fixed by the former, December 12, 1892 (Abstract, 2), and by the latter November 23, 1898 (Abstract, 6), in front of respondent's property, in water averaging less than one foot in depth, and from bare ground at low water to not exceeding two feet in depth at any point (Abstract, 35 and map Exhibit "A" part of answer), was an *unreasonable exercise of municipal power* upon the part of appellants and binds nobody.

Authorities, *supra*.

XVII.

Conceding for the argument that the city of Portland had the power to establish a wharf line, and to declare that wharves should not be extended outside of such line, even then the simple declaration of the municipality that the wharf was being constructed outside of such lines, and that the construction of the same was an obstruction to navigation and therefore a public nuisance, will not determine the question; and on such a declaration alone in the complaint, especially if the answer denies that the construction of the wharf does in any manner interfere

with navigation or commerce, or the improvement of the river, and that it is not a nuisance, either public or private, the plaintiff, the municipality, must prove by evidence, *other than the mere declaration of the city itself*, that the structure does interfere with navigation, or the improvement of the river or commerce, and that it is a public nuisance.

Yates *vs.* Milwaukee, 10 Wall., 498.
Angell on Tide Waters, 196.
And authorities, *supra*.

XVIII.

In the incorporation act of the port of Portland (bill of complaint, Abstract of Record, 3–4) there is no authority whatever conferred upon the port of Portland to establish *harbor* lines or *wharf* lines. The act, therefore, upon the part of the commissioners of the port of Portland, immediately preceding the commencement of this suit, November 2, 1898, in establishing by resolution (bill of complaint, Abstract of Record, 5–6) wharf lines on both sides of the Willamette river, was *ultra vires* and amounts to nothing; nor has the port of Portland any authority or jurisdiction whatever to declare what shall or shall not be the harbor or wharf line in the harbor of the city of Portland, or to declare what shall or shall not constitute a public nuisance in the Willamette river.

Sections, 6, 7 and 12, river and harbor act, September 19, 1890, 26 Stat., 453-456.
Sec. 7, act 1890, as amended July 13, 1892, Supp'l Rev. Stat. U. S., vol. 2, page 30.

XIX.

The harbor lines having been established in the Portland harbor by the Secretary of War, August 9, 1892, in pursuance of the power conferred on him by the twelfth

section of the river and harbor act of September 19, 1890 (26 Statutes at Large, 46), therefore, the ordinance of the common council of the city of Portland, approved December 12, 1892, establishing harbor or wharf lines (Abstract of Record, 2) was unconstitutional and wholly inoperative, except in so far as the harbor or wharf line established by such ordinance did not conflict with the line established by the Secretary of War; and wholly unconstitutional and inoperative as placing any restraint whatever on the Secretary of War to *grant permission* for the extension of a wharf or pier outside of the line established by him August 9, 1892, as authorized by the seventh and twelfth sections of the act, *supra*; and by the re-establishment by the Secretary of War of the harbor line in front of the respondent's property, September 23, 1898, and by the permit of the Secretary authorizing Montgomery to extend his wharf outside the harbor ine established August 9, 1892, the harbor or wharf line established by said city ordinance, in so far as it conflicts with the line as thus re-established by the Secretary of War, and with the permit of the Secretary of War, became a dead letter and wholly fruitless of any right whatever.

Authorities, *supra*.

XX.

From the pleadings in this case (bill of complaint, Abstract of Record, 1–9), (Record 16, 17), it is shown, and conceded by complainants, that no action whatever had been taken either by the city of Portland or the port of Portland, establishing either harbor or wharf lines in the harbor of Portland prior to August 9, 1892, when the harbor lines in said harbor were caused to be established by the Secretary of War. And it is further shown and conceded by said bill of complaint, that the

State of Oregon had not, prior to September 19, 1890, the date of the passage of the river and harbor act, *supra*, conferring power on the Secretary of War to cause harbor lines to be established in the navigable harbors of the United States, passed any act conferring upon the city of Portland power to establish harbor or wharf lines. This power on the part of the city only dates from February 19, 1891 (bill of complaint, Abstract of Record, 2). (Record 16, 17.) When, therefore, the General Government, in the interest of international and interstate commerce, assumed jurisdiction of the waters of the Portland harbor by establishing harbor lines therein, neither the State of Oregon, nor the city of Portland, nor the port of Portland, had established or attempted to establish any such harbor lines.

Bill of complaint, Abstract 1–9. (Record 16, 17.)

XXI.

"The authorities of a town will not be permitted to locate an imaginary deep-water line away from the navigable part of a river or bay and without making the water navigable up to that line, so as to deprive the riparian owners of the advantages of wharves, under a provision of law conferring upon such town the right to regulate the line of deep water to which wharves may be built."

Wool *vs.* Edenton, 117 S. C.; 1, 23 S. E. Rep., 40.

And authorities *supra*.

XXII.

Whenever a police power is so exercised by a State as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail.

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650–661.

Morgan *vs.* Louisiana, 118 U. S., 464.

XXIII.

The police power does not extend to depriving any person of the lawful use of property without due process of law, and without just compensation.

Matter of Jacobs, 98 N. Y., 110; 50 Am. Rep., 636.

Matter of Cheesbrough, 78 N. Y., 232.

Rockwell *vs.* Nearung, 35 N. Y., 302.

14 amendment, Const. U. S.

XXIV.

" Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river." (Transportation Co. *vs.* Parkersburg, 107 U. S., 707.) No foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf.

Mr. Justice Field in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 205.

Argument as to Insufficiency of the Bill of Complaint to Constitute a Cause of Suit.

It is submitted the bill of complaint in this case does not state facts sufficient to constitute a cause of suit, or to confer jurisdiction on a court of equity as to subject-matter.

A careful examination of the complaint will disclose the fact that there is no averment in it from beginning to end, to the effect that the driving of piles and the construction of the wharf by the defendant, Montgomery, in any manner injures the harbor of Portland, obstructs

its navigation, or in any manner prevents either the city of Portland, or the port of Portland, from deepening or widening the channel of the Willamette river in said city.

There is no averment that the work being constructed by the defendant, Montgomery, either constituted a nuisance, public or private, at the commencement of this suit, or that the same will, if completed, constitute any such nuisance.

It is true the bill of complaint avers that on a certain date the board of commissioners of the port of Portland, at a meeting duly called and held, adopted certain resolutions upon that subject, and that on a certain other date, November 23, 1898, at another meeting of the board of commissioners of the port of Portland, duly called and held, said commissioners adopted a certain wharf line, and did further resolve that the observance of such wharf line in the construction of wharves is necessary for a good and sufficient width of channel in said river, etc. But it is respectfully submitted, that the averment in the bill of complaint that said resolutions were adopted some time previously by the board of commissioners of the port of Portland, even conceding any power in said board to pass such resolutions, which we deny, is very far from being equivalent to an averment in the bill of complaint itself of the *existence of the facts stated in the resolutions*, and, further, that said board of commissioners had no jurisdiction or power to adopt such resolutions, or establish wharf lines; therefore, unless, after eliminating these two sets of resolutions from the bill of complaint, there is sufficient left in the bill to constitute a cause of suit, then the judgment of the court below should be reversed, if for no other reason, because of the failure of the bill of complaint to state facts sufficient to constitute a cause of suit. (Record, 16–20.)

A critical examination of the bill of complaint will show that, briefly stated, the following are the *sole* material averments it contains:

1. The appellant, The City of Portland, is a municipal corporation in the State of Oregon, existing by and uuder the laws of said State.

2. That the charter of said city provides that its common council "shall have power to regulate the building of wharves and driving of piles in the Willamette and Columbia rivers within the city of Portland, and to establish a line beyond which wharves shall not be built or piles driven," and that such provision has been since February 19, 1891, and is now, in full force and effect.

3. That on the ninth day of August, 1892, the United States engineers established a wharf line in the Willamette river within said city of Portland.

4. That by section 1 of an ordinance of the common council of said city, approved December 12, 1892, the wharf lines of the Willamette river were established in conformity to and coincident with the wharf lines established by the U. S. engineers.

5. That section 3 of said ordinance provides as follows: "All wharves or other structures hereafter built or erected on the river front of the city on the east side of the Willamette river shall not extend westerly beyond the line as laid down in section 1 of this ordinance, and all permits hereafter granted by the common council for the driving of piles, or the erection of structures, shall conform to said line."

6. That on the eighteenth day of February, 1891, the Legislative Assembly of the State of Oregon passed an

act incorporating the port of Portland, sections 1, 2, 3, and 9 of which are set out in the bill of complaint.

7. That the defendant, James B. Montgomery, is now and for some time has been engaged in the construction of a wharf on the east side of the Willamette river, within the city of Portland, and is driving piles and otherwise proceeding with the construction of said wharf in said river outside of the wharf line established as aforesaid, and proposes and declares his purpose to be to construct and complete said wharf between the center line of Essex street projected, to the river on the north, and the center line of Randolph street projected, to the river on the south, and extending into the river eighty-five feet beyond the said wharf line, and occupying more than 30,000 square feet of the bed of said river.

8. That on the twenty-first day of November, 1898, the board of commissioners of the port of Portland, at a meeting duly called and held, adopted certain resolutions, which are set out in the record.

9. And on the twenty-third day of November, 1898, at a meeting of the board of commissioners of the port of Portland, duly called and held, another resolution, which is set out in the record, was passed.

10. That the Willamette river is a river wholly within the State of Oregon.

11. That the defendant, Montgomery, notwithstanding said ordinance of the city and the proceedings of said port of Portland, persists in the construction of said wharf as aforesaid, and will, unless restrained by an order of the court, complete said wharf in the manner and to the extent indicated.

12. That the appellants have no plain, speedy or adequate remedy at law.

Abstract of Record, 1–9. (Record, 16–20.)

Conceding, therefore, for the present, the right of the respondents to sue, and also their right to establish wharf lines and regulate their construction and use; on these several averments, which, when boiled down, mean simply this: that the defendants in error established wharf lines; that in an ordinance of the city and in the resolutions of the board of commissioners of the port of Portland establishing said lines, it was declared wharves should not be constructed beyond them, and that the respondent, Montgomery, is about to extend his wharf beyond said line, and without any averment in the complaint that the action of Montgomery in so extending his wharf in any manner, or to any extent, obstructs the navigation or commerce of the harbor, or in any manner interferes with the work of the port of Portland in improving such harbor, or that his action, if permitted to go on, will create a nuisance either public or private, or that such wharf is being constructed any further beyond the line of low-water mark *than is necessary and convenient for the use and accommodation of ships entering said harbor*, a court of equity is asked to enjoin respondent from proceeding with the construction of his wharf.

We respectfully submit the bill of complaint, taken as a whole, and however construed, fails to state facts sufficient to constitute a cause of suit, and also fails to state facts sufficient to confer jurisdiction on a court of equity.

The objections that the complaint does not state facts sufficient to constitute a cause of suit, and that the court has not jurisdiction, are not waived by failure to demur, and these objections may be urged in the appellate court.

Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210.
Brown *vs.* Emmerson, 3 Oregon, 452.
Evarts *vs.* Steger, 5 Oregon, 147.
Mack *vs.* Salem, 6 Oregon, 275.
Olds *vs.* Cary, 13 Oregon, 362.
Kaldwell *vs.* Ruddy, 1 Idaho, N. S., 760.

Upon filing separate answer by defendant in court below (Abstract of Record, 17–26; Record, 25–30), and failure of respondents to file any reply, defendant was entitled to judgment on the pleadings dismissing bill of complaint.

The court will observe, by reference to the abstract of record, that the defendant in his answer, after making certain admissions and denials of the averments of the complaint (Abstract, p. 10–17), makes a further and separate answer to the bill of complaint, setting up new matter in defense. (Abstract, 17–26.) To this answer no replication has been filed, either to the whole or any part of it. Therefore, all material averments in the same must be taken as true. (Record, 25–30.)

Counsel for plaintiffs filed a demurrer to certain portions of said separate answer, and a motion to strike out certain other portions, both of which were overruled by the court, and no further pleading was filed.

No question was made in appellant's brief in the lower court as to the correctness of the decision of the court below in overruling said demurrer and motion to strike out.

The court will bear in mind there is no averment in the bill of complaint, aside from the recital of the resolutions of the board of commissioners of the port of Portland, to the effect that the construction of the respondent's wharf will in any manner interfere with the

commerce or navigation of the harbor, or that the same will in any manner interfere with the work of the port of Portland in widening and deepening a channel, or that the same will be a nuisance, either public or private, nor that the said wharf is being constructed further beyond the line of low-water mark than is *necessary or convenient for the use and accommodation of vessels.* (Hill's Code, sec. 4227.)

While the respondent, in court below, in his separate answer makes the following affirmative averments, the same not being a denial of any averments in bill of complaint, none of which are denied by any reply, and therefore must be taken as true:

"The defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same, nor will it be any obstruction to navigation or to the work of the port of Portland in making and maintaining a proper depth of water, in so far as the port of Portland may have any rights in the premises. Defendant avers that the construction of said wharf as planned and being constructed by him, instead of being an injury to the commerce and navigation of the Willamette river at the port of Portland, will be a benefit to the same, and a valuable aid in the carrying on of foreign and interstate commerce at said port of Portland." (Abstract of Record, 24–25.) (Record, 29.)

The following is section 4227 of Hill's Oregon Code above referred to.

"The owner of any land in this State lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water *beyond low-water mark so far*

as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water."

We submit, therefore, in any view of the matter, respondent is entitled to judgment and decree on the pleadings dismissing bill of complaint. The total insufficiency of the complaint in this case will be more fully demonstrated when we come to review the opinion of the court below in the closing pages of this brief and argument.

Argument on Merits.

I.

The assignment of errors, Nos. 6, 7, 9, 10, and 11 (Abstract of Record, 50–51), we refer now to the plaintiff's assignment of errors in the court below (Record, 447), may be considered as one, as there is really but one question involved in these assignments, and the *query* they suggest is simply this:

Assuming that the Secretary of War has the constitutional and statutory power to establish harbor lines in the harbor at the city of Portland, and assuming furthermore that he has in pursuance of such power established such harbor lines, then must any harbor or wharf lines established by the State, or by the city or port of Portland, under authority from the State, give way to the latter, in so far as they conflict with the lines established by the Secretary of War?

In other words, must the national authority or the State authority be paramount?

Leaving, therefore, the question as to the constitutionality of section 12 of the river and harbor act of Congress of September 19, 1890 (26 Stats, 455), which is the question suggested by the *third* assignment of error, and

also the question as to the right of the Secretary of War to change in September, 1898, the harbor lines established by him in August, 1892, as questioned by the *fourth* assignment, and also the question as to whether from the facts stated in the pleadings and evidence, the acting Secretary of War, G. D. Meiklejohn, had any jurisdiction to fix or interfere with the harbor lines in the city of Portland, as suggested by the *fifth* assignment, all to be discussed and considered later in this brief, and assuming for the present that none of these assignments are well taken, we will endeavor to establish the proposition that the harbor lines as established by the Secretary of War, September 23, 1898, must control, and any *harbor* or *wharf* lines established by the city, or port of Portland, in so far as they conflict with the lines thus established in virtue of the national authority in September, 1898, must be regarded as abrogated, inoperative and void.

The solution of these questions involves a careful consideration and determination of the powers respectively of the national and State governments, in respect to the establishment of harbor lines in the navigable waters of the United States.

The inquiry arises, therefore:

First. What are the character and extent of the power conferred on Congress by what is known as the commercial clause of the Constitution of the United States?

Second How far and to what extent has such power been exercised by Congress?

In many instances Congress has never yet exercised to its full limit *all* the power conferred by certain grants in the Constitution, while in others the full power granted has been exercised.

For instance, there are many subjects of legislation, doubtless, in reference to which Congress might consti-

tutionally legislate in virtue of the power conferred by the commercial clause, but in reference to which in some instances no action whatever has been taken by Congress, while in respect to others there has been only a *partial* exercise of the power granted.

As will be seen as we progress with this argument, there has been only a partial exercise of the power upon the part of Congress in reference to the *construction of bridges* over navigable waters of the United States, still leaving a modicum of power to the States respectively; while the power to establish *harbor lines* has been exercised by Congress to its *fullest extent*, leaving nothing whatever to the States, after Congress has acted.

We will concede in the outset that until the National Government acts, and establishes harbor lines in any navigable harbor of the United States lying wholly within the limits of a State, the power to establish harbor lines in such harbor is vested in the State within which such harbor lies, and the State in that case may either directly, or through a municipality, rightfully exercise such power and establish such harbor lines.

But, we submit as an incontrovertible proposition, that whenever Congress acts, either directly or through a proper instrumentality, such as the Secretary of War, and establishes harbor lines in any navigable harbor of the United States, although the same may be located wholly within the limits of a State, that then any harbor lines or line established in such harbor, either before or afterwards, by the State, or by any municipality operating in pursuance of authority conferred by the State, which in any manner conflict with the lines thus established by the General Government, must give way to the lines so established by the paramount authority.

The Principle Involved.

The principle involved in this controversy is one which more than any other has in the past history of this country commanded the best thought of both jurists and statesmen. The question as to the precise line which separates from each other the respective powers of the National and State governments, has, for more than three-quarters of a century, presented a controversy in Congress and legislatures, and judicial courts as well, wherein the best minds of the country were called into action, and which finally culminated in civil war; and yet, in the gradual development of the nation there must, in the very nature of things, arise from time to time disputes and conflicts of jurisdiction to be settled by the courts as to the proper location of this line of separation. The courts, both Federal and State, always careful that every right which properly attaches to a State should be preserved, have ever proceeded on the theory that it is infinitely better that the States respectively should be deprived of a *doubtful* power, rather than that the National Government should be deprived of a *doubtful* prerogative, and which might, therefore, tend to weaken its paramount authority and sovereign capacity as a national government; and hence it is, if the question at issue bearing upon this subject is at any time in any controversy one of doubt, that doubt should always, in defining and distributing the powers of the Federal and State governments, be resolved in favor of the former. It is believed, however, the questions involved in the case at bar have not been left in any doubt by the decisions of our highest judicial tribunal, and that they will, therefore, be found of easy solution by this honorable court.

At the risk of extending this argument to an unusual

length, we, for the convenience of the court, quote freely from authorities cited in support of our several propositions.

Authorities in Point.

II.

Mr. Justice Field, in Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., page 203, says:

"The power to regulate commerce between the States, as well as with foreign nations, vested in Congress, is the power to prescribe the rule by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which the commerce may be carried on and the means by which it may be aided and encouraged.* The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their sphere of operation the States may prescribe regulations *until Congress intervenes and assumes control of them*, yet, when they are *national* in their character and require uniformity of regulation affecting alike all the States, *the power of Congress is exclusive.*"

County of Mobile *vs.* Kimball, 102 U. S., 697.

Mr. Cooley, in Cooley's "Constitutional Limitations," page 732, says:

"It is not doubted that Congress has the power to act beyond the general regulations of commerce which it is a custom to establish, and to descend to the most *minute directions* if it shall be deemed advisable, and that to *whatever extent* ground shall be covered by those directions, *the exercise of State power is excluded.*

Cooley's "Constitutional Limitations," 732.

In the case of Wisconsin *vs.* Duluth, 96 U. S., 383, in which the question as to the power of Congress and the

rights of the States, respectively, to regulate commerce on the navigable waters and rivers of the country was considered, the Supreme Court of the United States, speaking by Mr. Justice Miller, said:

"It is not to be observed, as preliminary to an examination of the acts of the General Government in the special matter before us, that the whole system of river, lake and harbor improvements, whether on the seacoast or on the lakes, *or the great navigable rivers of the interior*, has, for years, been mainly under control of that Government, and that *whenever it has taken charge of the matter its right to the exclusive control has not been denied* * * * nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever arising has been how far and under what circumstances the exercise of the power is exclusive of its exercise by States. And while this Court has maintained, in many cases, the right of States to authorize structures in and over navigable waters of the States, which may either impede or improve their navigation, *in the absence of any action of the General Government in the same matter*, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, *that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this Court on this point are numerous. This subject was recently very fully considered in South Carolina *vs.* Georgia *et al.*, 93 U. S., 4; and it is affirmed in Pound *vs.* Turcke, 95 U. S., 495. The doctrine was settled, however, long before this. The following cases are fully in point: Gibbons *vs.* Ogden, 9 Wheat. 1; Wilson *et al. vs.* Blackbird Creek Marsh Company, 2 Peters, 245; Wheeling Bridge case, 18 Howard, 421; Gillman *vs.* Philadelphia, 3 Wall., 713."

In the case of Aldrich *vs.* The W. H. Beeman *et al.*, United States district court of New Jersey for the district of New Jersey, 45 Federal Reporter, 125, which case grew

out of a collision occurring July 28, 1889, in the East river, between a ferry-boat and a canal-boat towed by a tug, the State of New York had passed a law, prior to such collision, providing that the East river, between the Battery and Blackwell's island, should be navigated, as nearly as possible, in the middle of the stream. The court held that this act upon the part of the State was valid, but the decision was placed distinctly upon the ground that the State act was not in any respect in conflict with any act of Congress upon the subject regulating commerce with foreign nations. The court said:

"Congress is empowered to regulate both foreign and interstate commerce, and, whenever navigable waters form a highway over which commerce, foreign or interstate, is conducted, they must fall under the legislative control of the Federal Government. The fact that certain waters are navigable and are used for foreign or interstate commerce, does not exclude legislative regulation by a State, if, in fact, *Congress has not legislated in regard to them;* or, if such legislation has been had by Congress, if the legislation of the State *does not come in conflict with the congressional legislation, and is not antagonistic to the rights conferred or granted thereby, its validity is unquestionable.* * * * This statute of New York governing the conduct of vessels, while navigating the East river, *does not*, as far as I am informed, *conflict with or violate any legislation of Congress relating to commerce.*"

See Gould on Waters, sec. 138, page 254.

"It is competent for the State to establish wharf or harbor lines, and to empower commissions to license wharves and piers extending to such lines. Such statutes do not conflict with the commercial power of Congress *so long as the latter remains unexercised.*"

Savannah *vs.* State, 4 Georgia, 26.

Houck on Rivers, sec. 275, page 177, says:

"In this country, as well as in England, the public ports are considered as the great gates of the republic,

through which all its foreign intercourse by water is conducted; and, consequently, they can only be established and must, in some respects, be regulated by that department of the Government to which has been delegated the care of foreign commerce."

In the case of South Carolina *vs.* Georgia *et al.*, 93 U. S., page 11, the Supreme Court, Mr. Justice Strong delivering the opinion, said:

"It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage, if, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over foreign and interstate commerce is concerned, this is not to be doubted. * * * Upon this subject the case of Pennsylvania *vs.* Wheeling and Belmont Bridge Company, 18 Howard, 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction to navigation, It was, therefore, decided that the act of Congress declaring a bridge over the Ohio River, which, in fact, did impede steamboat navigation, to be a lawful structure, and requiring officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce."

South Carolina *vs.* Georgia, 93 U. S., 4.

In Gibbons *vs.* Ogden, 9 Wheat., 1–34, at page 7, Chief Justice Marshall, in defining the meaning of the term "commerce" in the clause of the Constitution, said:

"All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, must all have understood it in that sense; and the attempt to restrict it comes too late. * * * The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce." * * * If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

See also opinion of Justice Johnston, pages 27, 30, 31.

In the case of Herrman *vs.* Beef Slough Manufacturing Company, in the circuit court of the United States for the western district of Wisconsin, the court (Judge Bunn), after holding that in that case Congress had never assumed jurisdiction to regulate commerce on the Chippewa river, said:

"But, *until Congress assumes to control the commerce of the river*, I take it to be clear law that, as to those streams that are wholly within the territory of a State, though approachable by other streams from other States, as in this case from the Mississippi river, that the State within whose borders such rivers lie may legislate in reference to its commercial use as a public highway."

Herrman *vs.* Beef Slough Manufacturing Co., 1 Fed. Rep., 153.

Mr. Justice Field, in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., page 212, says:

"*The control of the navigable waters of a port and of all public waters constituting channels of communication* between the States and foreign countries, is embraced within the commercial power of Congress, and *equally beyond the interference of the States.*"

Steamship Co. *vs.* Port Wardens, 6 Wall., 31.

The word "commerce," used in the commercial clause of the Constitution, comprehends "navigation" within its meaning, and the power to regulate "*navigation*" is as expressly granted as though that word had been added to the word "commerce."

Gibbons *vs.* Ogden, 9 Wheat., 7–8–9–22–30–31.

Pennsylvania *vs.* Wheeling Bridge Co., 13 How., 518.

South Carolina *vs.* Georgia, U. S., 4.

In the case of the United States *vs.* Bellingham Bay Boom Company, circuit court of appeals for the ninth circuit, decided June 28, 1897, 81 Federal Reporter, 659, that court held that the enactment of section 10 of the river and harbor act of September 19, 1890, was an exercise of the constitutional right of Congress to regulate commerce between the States. The language of the court is this:

"At the time of the passage of the law by the State of Washington, and of the construction of the boom, there was no direct statute of the United States prohibiting the construction or maintenance of such booms in the inland rivers of the State. The adoption of section 10, of the act of Congress, *was an exercise of its constitutional right to regulate commerce between the States.* The object was to take control of the navigable waters of the United States so as to protect the interests of the Government, and prevent obstructions to the free navigation of such

waters. It was intended to apply to all cases where the States had failed to pass any law in regard thereto, and to prohibit obstructions not authorized by law. But it was not intended by Congress to be retroactive in its results."

In the case just cited, the boom, which it was sought to remove as an obstruction in the Nooksack river in the State of Washington, had been constructed prior to the passage of the river and harbor act of September 19, 1890, under an act of the legislature of the State of Washington authorizing the same. Therefore, the court held it could not be affected by the Congressional act.

It is conceded that *in the absence of legislation by Congress on the subject*, the State may authorize bridges or other works across navigable streams which are wholly within the State, and such legislation is not repugnant to the Constitution of the United States.

Wilson *vs.* Blackbird Creek Marsh Company, 2 Peters, 245.

Gillman *vs.* Philadelphia, 3 Wall., 713.

Pound *vs.* Turcke, 95 U. S., 459.

And generally, in respect to commercial matters which are *local* and *limited in their scope*, not requiring national and uniform regulations, the States may regulate them *until Congress intervenes*, but as soon as Congress acts the *State is excluded*.

Gloucester Ferry Company *vs.* Pennsylvania, 114 U. S., 196.

Brown *vs.* Houston, 114 U. S., 622.

Under this grant of power it is unquestionably the right of Congress, if it shall deem proper to exercise it, to *exclusively* regulate and control, with reference to the construction of bridges, the establishment of harbor lines, and the erection of other local structures, in all

navigable waters of the United States, *whether such waters, either rivers, harbors or bays, lie wholly within a State or otherwise.*

The Wheeling Bridge Case.

In the case of Pennsylvania *vs.* Wheeling Bridge, 13 Howard, 621, it was held that a law of the State of Virginia authorizing the construction of the bridge over the Ohio river at Wheeling was inoperative and void, for this reason, among others: Because it was in conflict with the legislation of Congress, which regulates commerce among the different States and with foreign nations, carried upon that river.

In that case objection was made that there was no act of Congress prohibiting obstructions in the Ohio river. To this objection the court, in its opinion by Mr. Justice McLean, replied as follows:

"It is objected that there is no act of Congress prohibiting obstructions in the Ohio river, and that until there shall be such a regulation, a State in the construction of bridges has the right to exercise its own discretion on the subject. Congress have not declared *in terms* that a State by the construction of bridges or otherwise shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as above remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for the neglect of these duties by which damage to life or property has resulted."

In the case of the State of Pennsylvania *vs.* Wheeling Bridge Co., 13 Howard, 565 *supra*, dissenting opinions were delivered by Chief Justice Taney and Associate Justice Daniels, who, while conceding the power of Congress to regulate commerce upon the Ohio river, dissented for the reason that in their opinion Congress had

never exercised the power in such manner as to prevent the State of Virginia from authorizing the construction of the bridge: In other words, these justices, in their dissenting opinions, held more strongly than did the majority of the court in favor of the rights of the States respectively as against those of the General Government. Therefore any statement of law by Mr. Chief Justice Taney as to the extent of the power of Congress in the premises should be taken as correct, at least in so far as it is applicable to the specific powers conceded by him, as he was a strict constructionist.

For the purpose of showing how he regarded the power of Congress under the commercial clause we quote the following from his dissenting opinion (13 Howard, 580):

"The Ohio being a public navigable stream, Congress has undoubtedly the power to regulate commerce upon it. They have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance, as, for example, the height of a bridge over the river, or *the distance to which a wharf may be extended into its navigable waters.*"

Mr. Justice Taney, proceeding further, says:

"*But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or any other navigable river to be a public nuisance* and directing it to be abated as such. Nor is there any act of Congress regulating the height of bridges over the river. We cannot derive any jurisdiction therefore upon this subject from any law of the United States, and if we exercise it we must derive our authority from other sources."

Here, then, is this great State's right jurist, Chief Jus-

tic Taney, asserting that Congress has power under the commercial clause of the Constitution to determine "*the distance to which a wharf may be extended into navigable waters.*"

In the case of The People *ex rel.* Board of State Harbor Commissioners *vs.* Potrero and Bay View Railroad Co., 67 Cal., 166, the supreme court of the State held that while the power of the State with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of Congress, still *until Congress acts on the subject the power of the State is plenary.*

Cardwell *vs.* American Bridge Co., 113 U. S., 205.

The Cincinnati Bridge Company Case.

The line between the respective powers of the National and State governments as applicable to the case under consideration has nowhere been so clearly defined as by the Supreme Court of the United States, opinion by Mr. Justic Brown, in the case of Covington and Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204. This opinion is so clear and instructive that we must be pardoned for quoting from it at some length. The court, at page 209, says:

"The adjudications of this court, with reference to the power of the States over the general subject of commerce, are divisable into *three* clas-es:

"*First.* Those in which the power of the *State is exclusive.*

"*Second.* Those in which the States may act *in the absence of legislation by Congress.*

"*Third.* Those in which the *action of Congress is exclusive* and the States cannot interfere at all."

The court proceeding further says:

"The *first* class, including all those wherein the States have plenary power, and Congress has no right to inter-

fere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power the State may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same (Railroad *vs.* Maryland, 21 Wall., 456), and may authorize the building of bridges over *non*-navigable streams, and otherwise regulate the navigation of the *strictly internal waters of the State, such as do not, by themselves, or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries.* (Veazie *vs.* Moor, 14 How., 568; The Montello, 11 Wall., 411; S. C., 20 Wall., 430.) This is true, notwithstanding the facts that the goods or passengers carried or traveling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the State regulations may be said to interfere with interstate commerce. * * * Congress has no power to interfere with police regulations relating *exclusively to the internal commerce of the States* (United States *vs.* De Witt, 9 Wall., 41; Patterson *vs.* Kentucky, 97 U. S., 501), nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. (License Tax Cases, 5 Wall., 462, 470, 471.)"

The court in the case, *supra*, proceeding to define the class of cases that comes under the *second* head *supra*—that is, those cases wherein the States may act *in the absence of legislation by Congress*, says:

"Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; Cooley *vs.* Philadelphia Board of Wardens, 12 How., 299; Steamship Co. *vs.* Joliffe, 2 Wall., 450; *Ex parte* McNeal, 13 Wall., 236; Wilson *vs.* McNamee, 102 U. S., 572. Quarantine and inspection laws *and the policing of harbors;* Gibbons *vs.*

Ogden, 9 Wheat., 1–203; City of New York *vs.* Miln, 11 Peters, 102; Turner *vs.* Maryland, 107 U. S.,38; Morgan Steamship Co. *vs.* Louisiana, 118 U. S., 455. The improvement of navigable channels: County of Mobile *vs.* Kimball, 102 U. S., 691; Escanaba Co. *vs.* Chicago, 107 U. S., 678; Huse *vs.* Glover, 119 U. S., 543. *The regulation of wharves, piers and docks:* Cannon *vs.* New Orleans, 20 Wall., 577; Packet Co. *vs.* Keokuk, 95 U. S., 80; Packet Co. *vs.* St. Louis, 100 U. S., 423; Packet Co. *vs.* Catlettsburg, 105 U. S., 559; Transportation Co. *vs.* Parkersburg, 107 U. S., 691; Ouchita Packet Co. *vs.* Aiken, 121 U. S., 444. The construction of dams and bridges across the navigable waters of a State: Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 245; Cardwell *vs.* American Bridge Co., 113 U. S., 205; Pound *vs.* Turk, 95 U. S., 459; and the establishment of ferries: Conway *vs.* Taylor's Executors, 1 Black, 603."

The court proceeding further, in the case of the Covington Bridge Company, *supra*, after referring to the fact that it had been held by some in the early history of the Government that the mere *grant* to Congress of power to regulate these matters, was in and of itself a *prohibition on the States* to exercise the same power, and also to the later and well-settled rule that it is not the *grant* of power that deprives the State of power, but the *exercise* of the same upon the part of Congress, and that therefore the States may legislate in the absence of Congressional legislation, proceeds to define the kind of cases that come under the *third* class, *supra*—that is, cases wherein the jurisdiction of Congress is *exclusive*, and States have no power at all. On this subject the court says:

"But wherever such laws, instead of being of a local nature, and not affecting the interstate commerce but incidentally, are national in their character, the nonaction of Congress indicates its will that such commerce shall be free and untrammeled and the case falls within the *third* class of those laws wherein the jurisdiction of

Congress is exclusive. Brown *vs.* Houston, 146 U. S., 622; Bowman *vs.* Chicago, etc., R. R. Co., 125 U. S., 465. Subject to the exceptions above specified, as belonging to the *first* and *second* classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States."

The "*regulation of wharves, piers, and docks*, and *the policing of harbors*" come under the *second* class mentioned by Mr. Justice Brown in the above case.

Notwithstanding all these authorities, wherein the Supreme Court of the United States has declared over and over again that where State legislation regulating the navigable waters of the country comes in conflict with national legislation on that subject, that the national legislation must prevail, counsel for defendants in error in their brief, filed in the court below, page 12 (Record, 51), say:

"Now it will be noticed that in these cases the court generally decided in favor of the claims set up under State authority, because there had been no legislation by Congress inconsistent with that authority; and while what was said by the court as to the effect of future legislation by Congress is entitled to respectful consideration, it was all outside of the cases before the court and clearly *obiter*."

This statement, we respectfully submit to the court, evinces a great misapprehension, as it seems to us, of the questions before the court and decided by the court in the several cases referred to.

And counsel are clearly at sea, as it seems to us, in the further statement in their brief, immediately following, to this effect:

"Further, it will be noticed that the only case decided by the U. S. Supreme Court, since the Wilson case,

2 Peters, *supra*, as to the effect of such legislation after it has been enacted, is the case in 165 U. S." (Record 51, 52.)

A reference to the authorities we have cited, *supra*, will show that this statement is also the result of misapprehension.

Counsel for defendants in error, in their brief filed in court below (Record, 48), pp. 5 and 6, say:

"Now, to fix the harbor lines of the ports of the United States is a regulation of commerce, or it is not. If it is, then the power so to do is exclusively vested in Congress. If it is not, then the city of Portland has an indisputable right to say where the wharf lines in its harbor shall be."

This, we respectfully submit, in view of the overwhelming authorities we have quoted, *supra*, is not a correct statement of the law. The establishment of a harbor line in the waters of a navigable harbor within the limits of a single State may be, and as we confidently assert, is "*a regulation of commerce*," and yet it does not follow that the power to establish harbor lines in such a harbor is *exclusively vested in Congress*. Upon the contrary, the establishment of harbor lines in such a harbor, being a subject of *local* character, which only affects international and interstate commerce *incidentally*, it follows, in view of the many decisions of the Supreme Court of the United States, with none to the contrary, that until Congress acts and assumes jurisdiction of the waters of such a harbor, the State, or the city acting under authority from the State, may do so. But, when the National Government acts, then the power of the State to act ceases, and if a conflict between the action of the two jurisdictions arises, that of the State must give way to that of the General Government.

We do not claim by any means, nor is it necessary, at least so far as this case is concerned, that Congress has any power under the commercial clause to authorize the Secretary of War to determine as to size, length, height or character of any wharf or warehouses within the city of Portland, constructed on lands bordering on the Willamette river. Our claim is this: That Congress has the power under the commercial clause to authorize the Secretary of War to establish, locate and fix a certain harbor line, on either side of the harbor at Portland, up to which wharves, piers, warehouses, and other commercial aids may be constructed, and beyond which it shall not be lawful, *without the consent of Congress*, or *the Secretary of War* representing Congress, upon the part of the State, or any corporation or municipality authorized by the State, or any individual, person, company, association or corporation, to construct or build any wharf, pier or warehouse of any kind whatever. And we claim, furthermore, that this is precisely the power exercised by Congress in the river and harbor act of September 19, 1890.

Congress Authorizes the Secretary of War to Establish Harbor Lines.

III.

In accordance with the doctrine recognized by the foregoing authorities, Congress in the river and harbor act of August 11, 1888, as amended in the river and harbor act of September 23, 1890 (26 Statutes, 455), enacted a law, the twelfth section of which reads as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is

hereby authorized, to cause such lines to be established, *beyond which no pier, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him;* and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense." (Sec. 12, act 1890, 26 Stat., 455.)

This provision will be discussed fully later on in this argument.

Congress has jurisdiction over the navigable waters of a river lying wholly within the limits of a single State.

IV.

Under the commerce clause of the Constitution of the United States, Congress has jurisdiction over a navigable river connecting with the ocean, where the stream is wholly within a single State.

Gibbons *vs.* Ogden, 9 Wheat., 1.
Veazie *vs.* Moor, 14 How., 568.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251.
Sillman *vs.* Hudson River Bridge Co., 2 Wall, 403.
Gillman *vs.* Philadelphia, 3 Wall., 713.
The Passaic Bridge, 3 Wall., 782.
Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.
Brown *vs.* Houston, 114 U. S., 622.

This doctrine was asserted by Chief Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheat., 1824. The opinion says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a point within a State, *then the power of Congress may be exercised within a State.*"

What is a navigable water of the United States within the meaning of those terms as used in the legislation of Congress?

V.

What is meant, then, by "navigable waters of the United States?" They are waters navigable by licensed and enrolled and registered sea-going vessels, engaged in commerce upon the ocean with foreign nations, and with other States, and within the ebb and flow of ocean tides, although this, as to the tides, is not (since the decision of the United States Supreme Court in the case of the Genesee Chief (12 How., 443), essential, irrespective of the fact that such waters may extend far into the interior of any single State. Nor is it essential in order to bring rivers within this definition, that they should be navigable by sea-going vessels, provided they connect with waters so navigable, and are themselves navigable in fact for steamboats and other craft. That the Willamette river is such a stream cannot be questioned, and although some stress was laid upon this point by counsel in the circuit court, it seems to have been entirely abandoned in the argument in the Supreme Court of the State.

It is conceded by us that if this power upon the part of Congress to so control the navigable waters of the United

States, in regulating commerce with foreign nations in reference to these *local* matters, is permitted to lie dormant; in other words, if Congress has taken no action in regard to the control generally of these local matters in navigable waters, or of any particular navigable water, that then the jurisdiction and power to control such waters in these local matters wholly within the limits of the State, rest with the State. The authorities upon this point are uniform and conclusive.

If, however, Congress has asserted the full power referred to in regard to any of the navigable waters of the United States lying wholly within a State, and assumed full jurisdiction over the same, then the State has no power whatever to pass any act looking to the control of such waters which in any manner conflicts with the exerted power of the Federal Government. And any acts previously passed by the State which conflict with the legislation of Congress become immediately obsolete and inoperative.

Congress has taken jurisdiction of and legislated by both special and general acts relative to the waters of the Willamette river.

VI.

What are the facts, then, in reference to the case at bar, and with reference to the navigable waters of the Willamette river running through the city of Portland?

Prior to August 11, 1888, Congress had not asserted any general control over the waters of the Willamette river except by making appropriations from time to time for the improvement of its navigation. As clearly indicating, however, that Congress regarded these waters as subject to the control of Congress, separate and special acts of Congress were passed in relation to the construc-

tion of bridges over the Willamette river; these were passed prior to September 19, 1890.

The first was an act approved February 2, 1870, which gave consent to the city of Portland to erect a bridge from Portland to the east bank of the Willamette river, not obstructing, impairing, or injuriously modifying its navigation, and requiring that the city should first submit the plans of such bridge to the Secretary of War for his approval.

The second act was passed on the twenty-second day of June, 1874, which authorized the county commissioners of Marion county, or said commissioners jointly with those of Polk county, to build a bridge across the Willamette river at Salem, Ore., a distance of fifty miles further into the interior of the State than Portland.

The third act was passed June 23, 1874, which authorized the Oregon & California Railroad Company alone or jointly with the Oregon Central Railroad Company to build a railroad bridge across the Willamette river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw-abutment, and so constructed as not to impede the navigation of the river and allow free passage of vessels through the bridge.

These acts, as we have stated, were all of a *special* nature, and did not involve the assumption by Congress of general national police powers over the river.

In the river and harbor act, however, approved September 19, 1890 (see Supplement to the Revised Statutes of the United States, volume 1, pages 800–803), Congress enacted a general law, amendatory of the act of August 11, 1888, applicable to all the navigable waters of the United States, which, according to the definition heretofore given, included the navigable waters wholly within a State as well as those not within it.

In this act there were really embodied two separate and distinct acts or provisions—in the different sections, the one having no relation whatever to the other—the one having *sole* reference to the *construction of bridges*, and *works of like character*, and the other having *sole* reference to the *establishment by the Secretary of War of the harbor lines* of the various harbors in the United States, and providing beyond which no wharf, pier, bulkhead or other obstruction should be erected, *without permission from the Secretary of War*. Sections 4, 5 and 6, and a part of section 7 of this act relate mainly to the construction of bridges, while a portion of section 7 and section 12 relate exclusively to the establishment of harbor lines. (26 Stat. U. S., pages 453–455.)

It has been held by the Supreme Court of the United States in the case of The Lake Shore and Michigan Railway *vs.* The State of Ohio, 165 U. S., 365, that the provisions in sections 4, 5 and 7 of the act of September 19, 1890, above referred to, conferring upon the Secretary of War authority concerning *bridges over navigable waters*, did not deprive the States of authority to bridge such streams; that is, of authority to both *authorize* their construction, and under certain conditions, that is, after the plans for the same have been submitted to the Secretary of War, and approved by him, to *construct* the same, but simply created an additional cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce. This authority is quoted by the counsel for defendants in error in support of their contention in the case at bar.

We have no controversy with counsel in regard to the meaning of this decision of the Supreme Court of the United States in its application to the construction of bridges across navigable waters wholly within a State. A careful examination, however, of the act of 1890, and

a comparison of sections 4, 5, 6 and a part of 7 of that act relating to bridges (and which sections *only* were construed by the Supreme Court of the United States in 165 U. S., 365), with section 12 and part of section 7 of that act, which relate *solely to the establishment of harbor lines*, will show at a glance that the decision in 165 U. S. cannot have any possible bearing whatever upon the questions involved in the present controversy. In the one case—that is, in the legislation relating to bridges—it is perfectly clear, as stated by the Supreme Court in 165 U. S., that it was not the intention of Congress to deprive the States from legislating in regard to bridges over waters wholly within a State, but was only intended to give the Secretary of War supervisory control.

By section 4 it was provided—

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw-opening, or the draw-span of such bridge, by rafts, steamboats or other water craft, it shall be the duty of said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

While section 5 makes it a misdemeanor upon the part of the party, corporation, association or company notified if they fail to comply with the order of the Secretary of War, and upon conviction the party so failing is punishable by a fine not exceeding $5,000, and for every month such person, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, etc.

It is perfectly clear that these sections do not attempt to take from the State all control of the subject, while section 7, still relating to bridges, provides as follows:

"* * * and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War."

Here, again, while Congress exercises a *portion* of the power conferred by the commercial clause of the Constitution, it is manifest there is no expression of an intention upon the part of Congress to take from the States the power to authorize the construction of bridges over navigable waterways wholly within a State, but only to provide that after the erection of such bridges has been authorized by the State, the construction of the same shall not be commenced "*until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War.*" This legislation, therefore, relating to bridges, was only a *partial* exercise of the power which Congress *might have exercised*, but did not. Clearly, according to the weight of authority, Con-

gress, by a single line in the act, could have said—and constitutionally have said, under the power of Congress to regulate commerce—"from and after the passage of this act, no State shall exercise any control whatever in the construction of bridges or other works over or in any of the navigable waters of the United States wholly within a State." Congress, however, did not do this, in so far as it legislated in reference to bridges, hence the decision in the case of the Lake Shore and Michigan Railway *vs.* the State of Ohio, 165 U. S., cited by counsel, while undoubtedly good law has no application to Mr. Montgomery's case.

Mark the clearly defined difference between the provisions of the act of September 19, 1890, relating to the construction of bridges, and those of the same act authorizing the establishment of harbor lines. In the one case, the former, Congress only partially exercised the power conferred by the commercial clause of the Constitution, while in the latter the whole power was exerted.

VII.

The provisions, however, in the river and harbor act of September 19, 1890, relating to the establishment of *harbor lines*, are wholly and radically different. Here Congress exerted its *full constitutional power*, and, without any qualifications, limitations or conditions whatever, conferred upon the Secretary of War the full and unrestricted power "to cause the harbor lines to be established in any harbor, beyond which no piers, wharves, bulkheads or other works may be extended or deposits made, *except under such regulations as may be prescribed*

from time to time by him." That is, the Secretary of War.

These sections of the river and harbor act of September 19, 1890, relating to harbors, are *in hæc verba* as follows:

"SECTION 12. That section 12 of the river and harbor act of August 11, 1888, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to, cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, *except under such regulations as may be prescribed from time to time by him:*

"And any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, at the discretion of the court, for each offense."

Supplement to Revised Statutes U. S., volume 1, page 803, 26 Stat., page 455.

While section 7 of the same act, and as amended by the act of July 13, 1892 (27 Statutes, 98–110) provides as follows:

"SECTION 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, *without the permission of the Secretary of War*, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters;

and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers, and abutments, causeway, or other works over or in any port, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, *unless approved and authorized by the Secretary of War.*

"*Provided:* That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge piers and abutments or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

Here, it will be observed, by section 12, *supra*, no power whatever is left to the State. The whole business of establishing harbor lines for harbors within the navigable waters of the United States, whether located wholly within a State or otherwise, was taken from the States and jurisdiction assumed by Congress.

Undoubtedly in a case where the Secretary of War has never acted, the State, through a municipal coporation or otherwise, might, prior to the passage of the above act of September 19, 1890, lawfully establish harbor lines for any harbor without consulting the Secretary of War, in reference to which all parties would be compelled by law to conform. These lines, however, if established, must give way, of course, to the superior authority of Congress, whenever the Secretary of War

does act, and any harbor lines established by the State or city, under authority from the State, must give way to those established by the Secretary of War.

In the case of the port of Portland, no action whatever had been taken, either by the city or port of Portland, establishing either harbor or wharf lines, prior to the action taken by the Secretary of War August 9, 1892.

Furthermore, since the passage of the act of September 19, 1890, *supra*, even though the Secretary of War may not have established any harbor lines at a given point, no person, association or corporation could, under any authority from a city or State, lawfully build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind in any of such navigable water of the United States in such manner as would obstruct or impair navigation, commerce or anchorage of such waters, *without first obtaining permission of the Secretary of War*. This, as we have said, in cases where the Secretary had established no harbor lines. This is clear from section 7 of the river and harbor act of September 19, 1890, as amended by the act of July 13, 1892, 27 Stat., 88–110, and under this provision it is clear that the Secretary of War may, in his discretion, in the interest of foreign, or interstate commerce, authorize the construction of a wharf *outside of established harbor lines*, even though such construction may to some extent obstruct or impair navigation, commerce or anchorage.

The following statement, therefore, in the brief of counsel for appellants in the court below, page 15: "We submit that said section 4 is as much of an assumption of *exclusive* control over *existing bridges* as section 12 is over *existing harbor lines*," is, in view of the foregoing analysis and comparison of the two sections, and of the decision of the Supreme Court in 165 U. S., not borne out by the facts.

The Secretary of War has authority to change and relocate harbor lines previously established by him.

VIII.

Counsel for appellants' *fourth* assignment of error in lower court (Appellants' Abstract of Record, 50) (Record, 44) reads as follows:

"Said court erred in holding that the Secretary of War had any right in 1898 to change the harbor lines that were established in 1892."

While subdivision II of the brief for appellants, page 20, is as follows:

"The Secretary of War had no right to change or relocate established harbor lines." (Record, 44.)

The law presumes that the Secretary of War in re-establishing the harbor line, September 23, 1898, acted within his jurisdiction.

19 Am. & Eng. Ency. of Law, 43, and authorities there cited.

And so far from anything in the record showing affirmatively that the Secretary did not act within the limits of his power, there is abundant proof to show that he did, as will be shown presently.

It is submitted that the observations of the learned counsel in brief filed in court below, and which will doubtless be repeated in brief filed here, on the word "*establishment*," to the effect that it relates exclusively to an "*inceptive and original act*" (Appellants' Brief, 9, (Record, 160), are hypercritical. Counsel say, "How can a thing be established that has been already established?" Webster defines the term "*establish*" as follows: "To enact or decree by authority; to decree; to enact; to ordain; said of laws, regulations and the

like." That is to say, we establish laws, we establish regulations, we establish things of like character. But who will contend that any law or regulation or the like must, unless it indeed be those of the Medes and Persians, remain *ex necessitate* forever unchangeable, because forsooth they were once *established*. Laws are changed, regulations are changed by the same authority that established them originally. In other words, laws are changed and re-established, regulations are modified and re-established.

Webster's Dictionary, Unabridged.
United States *vs.* Eliason, 16 Peters, 291.
United States *vs.* Romard, 89 Fed. Rep., 157.

In the case, *supra*, U. S. *vs.* Elliason, 16 Peters, 291, the Supreme Court of the United States, in considering the act of Congress of March 3, 1835, and the order of the War Department of March 13 of the same year, establishing certain rules and regulations for the government of the army, said:

"The power of the Executive to establish rules and regulations for the government of the army is undoubted. The power to establish *implies necessarily the power to modify or repeal or create anew*. The Secretary of War is the legal and constitutional organ of the President for the administration of the military establishment of the nation. The rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority."

In Gratiot *vs.* United States, 4 Howard, 80, this court said:

"As to the army regulations this court has too repeatedly said that *they have the force of law* to make it proper to discuss or contend anew."

Upon the question as to the right and power of the Secretary of War to change and re-establish and relocate a harbor line in a harbor, after having once caused the same to be established, see the recent case of the United States *vs.* Romard, decided in the circuit court of the southern district of New York, August 4, 1898, 89 Federal Reporter, page 157, which is directly in point.

The act of Congress of June 29, 1888, as amended by the act of August 18, 1894, prohibited the deposit of refuse and other material within the harbor of New York and other waters within limits prescribed by the supervisor of the harbor. The court in passing upon this act held, *first*, that it did not unlawfully delegate any portion of the power of Congress over navigation and commerce, and, *second*, that the points at which the refuse might be deposited *might be changed from time to time by the supervisor*, the court says:

"Congress did not thereby delegate to the supervisor any of its power 'to regulate commerce,' and the included control of the navigable waters of the United States. The supervisor is not authorized to declare that dumping of refuse of various kinds is obstructive or injurious to navigation and punishable. He is merely directed to overlook the detailed operation of such dumping, to the end that the deposit shall not be harmful to navigation, with the same purpose *harbor masters are authorized to designate the place of anchorage of ships, and locate and shift locations as the conditions of shipping in the harbor require*. Obviously the two houses of Congress and the Executive could not take the immediate oversight of the dumping scows, directing the deposit in one place or another as the exigencies of the day or hour demanded, and no general law could meet the mischief sought to be avoided, and hence the mere detail of protecting the harbor was committed to a subordinate officer. It is erroneously suggested that the supervisor may declare what are obstructive and injurious deposits.

"The act does this, and the supervisor merely designates where such deposits may be made without obstructive and injurious effects. The shifting conditions necessitate shifting places of deposit, *so that in a sense what is innocent at one hour may be offensive at another.* But that is a mere matter of police regulation whereby a public officer is authorized to command scows using the harbor to adapt themselves to certain transitory conditions in the manner that may seem suitable to such officer. The act specifically provides that every scow shall be dumped only in the place or places indicated by the supervisor. *It would be strange if the United States with its power over navigable waters could not place a keeper over the same with power to decide what portion of its vast domain should receive the refuse of a great city where the propriety of selecting such portion depended on ever-changing conditions.* Such a power cannot be denied to it in the present instance as it would defeat the only practical and available means of protecting from nuisances the waters under its jurisdiction, and this may be by a sweeping enactment prohibiting all deposits in the harbor and within a certain distance thereof."

United States *vs.* Romard, 89 Fed. Rep., 157.

This case of Romard, *supra*, is directly in point, not only upon the power of Congress to authorize the Secretary of War to establish harbor lines, but also upon the question as to his power to change and relocate such lines.

The demands of foreign commerce may at certain times and in certain places demand that the riparian owner shall be permitted to-day to extend his wharf outside of the harbor line established ten years ago. There may be a change in the current of the stream, as is not infrequently the case, from one side of the river to the other, making it impossible for ships to connect with wharves on the old line, and thus Congress, in the exercise of the power conferred by the commercial clause, has wisely provided for just such cases.

The Secretary of War has authority under Sections 7 and 12, Act 1890, to give respondent permission to extend his wharf beyond the harbor line established by him August 9, 1892.

IX.

By sections 7 and 12 of the river and harbor act of September 19, 1890, the Secretary of War is clothed with power to authorize the construction of a wharf *outside* of an established harbor line. (See quoted sections, *supra.*)

Sections 7 and 12, act 1890, 26 U. S. Stat., 454–455. 27 U. S. Stat., 110.

This inhibition in section 7, *supra*, against building outside the established harbor line "without the permission of the Secretary of War" is the equivalent of a legislative declaration—

First. That the Secretary of War may in his discretion make an order permitting the building of a wharf outside of such line, and

Second. That with such permission a wharf may be lawfully constructed, either in whole or in part, *outside* of such line.

And this view is confirmed by a clause of section 12 of same act, which after providing that the Secretary of War may cause harbor lines to be established, concludes as follows: "Beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, *except under such regulations as may be prescribed from time to time by him" (the Secretary of War).* And then the same section declares that any person wilfully violating any of the provisionsof that section, "*or any rule or regu-*

lation made by the Secretary of War in pursuance of this section," shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding $1,000.00 and imprisonment not exceeding one year at the discretion of the court for each offense.

Sec. 12, act Sept., 19, 1890; 26 U. S. Stat., 455.

If then, the Secretary of War has the power, as we confidently insist he has, to permit a wharf or pier to be extended *outside* of a harbor line established by him in pursuance of an act of Congress passed in the execution of the power conferred by the commercial clause of the Constitution, and if in the exercise of such power he has made an order permitting it, what right, we inquire, has the State or any municipality, acting under authority from the State, to say such wharf shall *not* be so built? What voice shall be obeyed, that of the *nation* or that of the *municipality*?

Counsel for appellants in their brief filed in the Supreme Court of the State, pages 24–25, contend that by fair construction of section 7, act of 1890, *supra*, "that the States and individuals may do anything *inside* of harbor lines, or where there are no harbor lines, which does not "impair the navigation, commerce or anchorage of such waters.'" (Appellants' brief, 24–25.) (Record 59.)

But this certainly cannot be so, as this section 7 must be considered in connection with section 12 of the same act, which, after authorizing the Secretary of War to cause harbor lines to be established, says, referring to such lines:

"Beyond which no piers, wharves, bulkheads or other works shall be extended, or deposits made, *except under such regulations as may be prescribed from time to time by him* (the Secretary of War)."

This, it will be observed, is a positive inhibition against

individuals, cities and States, and the whole world. No one can extend or authorize the extension of any pier or wharf, beyond the harbor line thus established by the Secretary of War, *except under such regulations as may be prescribed by the Secretary of War*. And is it not clear beyond all controversy, if Congress has, in pursuance of the commercial clause, authorized the Secretary of War to *grant permission* to a riparian owner to extend his wharf *outside* the established harbor line, that the State has not the power to prevent such owner from extending his wharf *inside to* such established harbor line? If the State can do this then it can clearly defeat all action under the Federal authority, and completely nullify the act of Congress.

X.

Section 6 of the act of September 19, 1890, *supra*, makes it unlawful to—

"cast, throw, empty or unload, or cause, suffer, or procure to be cast, thrown, emptied or unladen, either from or out of any ship, vessel, lighter, barge, boat or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river or navigable waters of the United States, which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods or otherwise, whereby navigation shall or may be impeded or obstructed."

This section provides further as follows:

"Provided, that nothing herein contained shall extend, or be construed to extend, to the casting out, unloading, or depositing of any material excavated for the improvement of navigable waters into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable, and for the best interests of such improvements, *or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.*"

Now, suppose the Secretary of War, in pursuance of the authority conferred by this section, should designate some particular point or points in the navigable waters of the harbor of Portland for the dumping of the substance mentioned in the foregoing statute, and suppose subsequently to such designation by the Secretary of War the city or the port of Portland should designate a certain other point or points where such matter could be dumped, and a conflict should arise between the Federal and State governments. Would this court for one moment hold that the action of the city or the port of Portland should be sustained? Most certainly not.

What is the effect of the action of the Secretary of War in controlling harbor lines?

XI.

Now, what is the effect of this legislation, sections 7 and 12, act of September 19, 1890, in relation to the establishment of harbor lines in harbors and of the action of the Secretary of War thereunder? Unquestionably, the purposes of such legislation being kept in view, namely, to protect harbors from encroachment, facilitate navigation and anchorage of vessels, etc., the true con-

struction of this legislation is this: It says in substance and legal effect to all concerned—property-owners, navigators, shippers, warehousemen, wharfingers, States, towns, cities, municipalities, citizens—"Here are the established harbor lines of this harbor. These lines are established by the Secretary of War under and in virtue of a law of the United States, enacted in pursuance of the constitutional grant of power to Congress to regulate commerce with foreign nations. Up to this line from the shore such structures, in the shape of wharves piers, warehouses, etc., as the riparian proprietor may, as such riparian proprietor, lawfully erect, may be erected." In other words, "every right which attached to the riparian proprietor, with reference to the construction of wharves, piers, warehouses, etc., may be exercised by him up to this line. Beyond this line, however, such riparian proprietor or any other person, shall not be permitted to go, *except* (here again is indicated the intention of Congress to assume absolute control in the matter of the location of wharves, or rather as to the limit within which they may be erected) *under such regulations as may be prescribed from time to time by him*" (the Secretary of War). In other words, it may be lawful to erect a wharf, pier, bulkhead or other works even *beyond this harbor line*, provided it is done as provided in section 12 of said act, under such regulations authorizing him to do so as may be prescribed from time to time by the Secretary of War, *or* if the *permission of the Secretary of War* is first obtained as provided in section 7 of said act.

Counsel for appellants in their brief, page 12, in lower court comment on the terms "*prescribe*" and "*regulations*," and insist that as used in section 12 of the act of 1890, *supra*, the term "*regulations*" means rules which only become operative *after they are written out and published*.. We quote from the brief:

"The regulations referred to are to be '*prescribed.*' To '*prescribe*' means to write beforehand. The word '*regulations*,' as here used, evidently means rules for the management of harbors *to be written out and published before they take effect!*"

We can not believe this to be the correct interpretation of these terms as used in section 12, *supra*, but insist that the clause, taken as a whole, "except under such regulations as may be prescribed *from time to time* by him," means and was intended to mean simply this: That whenever a natural person or a corporation or municipality shall make application to the Secretary of War for permission to extend a pier, wharf, bulkhead or other works, or to make a deposit, beyond the established harbor line, that the Secretary will then examine such particular case and either grant or refuse it; and in case he grants the permit, then to attach such conditions by prescribing such regulations as would in such case seem to be proper and reasonable.

This view is supported by the use of the words "*from time to time;*" that is, from time to time as each application is presented the Secretary shall prescribe the regulations which shall govern that case. A regulation that would be proper and applicable to one case might be wholly improper and inapplicable in another, or indeed in many other cases.

In the case of Mr. Montgomery's application the Secretary *prescribed* the precise distance, varying from less than twelve feet at one end to considerably less than eighty feet at the other end, and eighty-five feet at one intermediate point, which he should be permitted to extend his wharf beyond the harbor line as established August 9, 1892.

But a still further and conclusive answer can be made to the suggestions of counsel in their brief just quoted. It

is perfectly clear that if the Secretary of War has power to grant a permit to extend a wharf beyond the established harbor line, coupled with a power to prescribe from time to time regulations governing the same, then he has the power, should he in any given case believe that no regulation is necessary, to grant the permit without prescribing *any* regulation. Conceding counsel's construction, therefore, of the clause to be correct, and conceding further that no such rules were ever prescribed beforehand and published, still the action of the Secretary in granting a permit, in the absence of any such regulations, would be binding.

Harbor lines were established at the port of Portland by the Secretary of War, August 9, 1892.

XII.

In pursuance of the twelfth section of the act of September 19, 1890 (26 Statutes of the U. S., 455, *supra*), the Secretary of War on August 9, 1892, caused the harbor lines on both sides of the Willamette river in the port of Portland to be established.

Bill of complaint, Appellant's Abstract of Record, 2, in court below. Respondent's answer (Appellant's Abstract of Record, 17–18), in which this fact is averred, and the same is not denied, in fact, appellant's counsel concede this line was so established at that date. (Record, 16 and 22.)

The Acts of Acting Secretary Meiklejohn are those of the Secretary of War.

XIII.

By the act of March 15, 1890, provision was made for the appointment of an Assistant Secretary of War, to be

appointed by the President by and with the advice and consent of the Senate.

Supplement to the Revised Statutes U. S., vol. 1, second edition, page 707.

Section 177 of the Revised Statutes, page 22, provides as follows:

"In case of the death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President * * * perform the duties of such head until his successor is appointed, or such absence or sickness shall cease."

The Secretary of War on September 23, 1898, gave the respondent, Montgomery, permission to extend his wharf outside the harbor lines established by him August 9, 1892, and also at the same time the Secretary changed the location of the said line and re-established it.

XIV.

In pursuance of these provisions of sections 7 and 12, *supra*, the respondent Montgomery on May 21, 1898, (Abstract of Record, 35) made application to the Secretary of War for an order permitting him to extend his wharf a certain clearly defined and accurately described distance, in length and width, *outside* the harbor line established by the Secretary of War August 9, 1892, (Abstract of Record, 31); and also praying that the harbor line thus established be relocated and re-established on a certain line also clearly defined and designated in such application. (Abstract of Record, 35.) (Record, 6–11.)

Subsequently, on September 23, 1898, the said appli-

cation of the respondent Montgomery was in all respects granted by the then acting Secretary of War, G. D. Meiklejohn, by the following endorsement on said application:

"Ninth endorsement.

"WAR DEPARTMENT, *September 23, 1898.*

"In accordance with the views of the Chief of Engineers the request of Mr. James B. Montgomery will be complied with.

"[Signed] G. D. MEIKLEJOHN,
"Acting Secretary of War."

And also on the same date said acting Secretary made the following endorsement upon the map accompanying and a part of such application:

"WAR DEPARTMENT, *September 23, 1898.*

"The change in harbor line shown in red hereon is approved.

"[Signed] G. D. MEIKLEJOHN,
"Acting Secretary of War."

Findings of fact, Abstract, 41–42. (Record, 6–11.)

By these two orders, therefore, of the acting Secretary of War, *both* of the things prayed for by Mr. Montgomery were granted, namely:

First. Permission to construct his wharf in part *outside* of the harbor line established August 9, 1892, and

Second. The harbor line was relocated and re-established in front of the property of the respondent Montgomery, on the line as prayed for in his application.

Findings of fact, Abstract of Record, 42–43. (Record, 6–11.)

And the respondent is constructing his wharf wholly *inside* of the harbor line thus established by the Secretary of War, and in accordance with the *permission* given him by the Secretary of War.

Should we, therefore, for the present and for the sake of the argument, concede the contention of counsel for appellants, that the Secretary of War has no power to change, or re-establish a harbor line once established by him, the respondent, Montgomery, had by virtue of these two orders of the Secretary of War his *permission* to extend his wharf *outside* of the harbor line as originally established August 9, 1892, and as authorized by said sections 7 and 12, *supra*, of the act of September 19, 1890.

See number sixth finding of fact, Abstract of Record, 35–36. (Record, 6–11.)

See also original application of respondent, Montgomery, of date May 21, 1898, on file as evidence in this case. (Record, 26–28.)

Respondent's fifth assignment of error in the court below is not well founded.

Appellants' fifth assignment of error (Appellants' Abstract of Record, 50) reads as follows: (Record, 6–11.)

"Said court erred in holding that the facts as they appear in the pleadings and evidence gave the Secretary of War, or G. D. Meiklejohn, any jurisdiction to fix, or interfere with the harbor lines within the city of Portland."

A careful inspection of the pleadings will show that this assignment is not well founded. By a reference to the appellants' abstract of record, it will be seen that the sixth finding reads as follows (Appellants' Abstract of Record, 50) (Record, 6–7):

"That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1,

2, 3, 4, 5, 6 and 7, was located too far *inland*, and at many points in water only six inches to two feet in depth, and *praying that said line in front of said lots, and for the distance as hereinafter particularly described should be relocated.* That the Secretary of War, on receipt of said application of the defendant, Montgomery, directed that a public hearing be had on the subject before Major W. L. Fisk, major corps of engineers, U. S. A., at Portland, Oregon, with the view of ascertaining whether such change in said harbor lines as prayed for by defendant, and whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted. That such public hearing was had by Major Fisk on August 5, 1898, and pending which the petition of the defendant, Montgomery, was on the seventh day of August, 1898, amended by him at the written request of Major W. L. Fisk, major corps engineers, U. S. A., so as to more definitely describe the change in the harbor line asked for, which amendment was embodied in a communication from the defendant, James B. Montgomery, of which the following is a copy:

"PORTLAND, OREGON, *August* 17, 1898.

"To Major W. L. Fisk, corps of engineers, in charge of river and harbor improvements.

"DEAR SIR: In reply to your letter asking for a definite location of the change in the established wharf line in front of my property in Albina, as desired by me, I would state as follows, viz:

"I respectfully ask that the established wharf line be *relocated* according to the following description:

"The prolongation northward of the present established wharf line, from the center line (produced) at Knight street, and the center line (produced) of Randolph street, to an intersection of a prolongation southward of the present established wharf line along the face of the Northern Pacific Terminal Company's dock or wharf, from the intersection of said line with the center line of Russell street (produced).

"Very respectfully yours,

"J. B. MONTGOMERY."

(Record, 7.)

Thus, it will be seen, everything essential to the jurisdiction of the Secretary of War was brought to his attention and made a matter of record before him.

This application, moreover, it will be seen by the court, was in its claims twofold in character:

First. A relocation, or establishment of the harbor line at the points indicated was prayed for, and reasons for the same were presented, showing clearly that it was for the true interests of the harbor of Portland that such change in the location of the harbor should be made, as it must be apparent to all that a harbor line along a navigable ship harbor which is located in water from only six inches to two feet in depth, was not properly located, the best interests of the harbor being considered; and

Second. The defendant, Montgomery, in this application, prayed *for permission to extend his wharf beyond the harbor line established August 9, 1892*, to a line definitely described and indicated by him in his letter to Major W. L. Fisk of August 17, 1898, as requested by Major Fisk.

Will it be seriously contended that this petition *supra* did not show clearly and conclusively on its face that the harbor line as established August 9, 1892, was located entirely too far landward, the preservation and protection of the harbor being considered? And is it not a fact, furthermore, that the petition of Mr. Montgomery distinctly prayed for a *relocation* of the harbor line at said point? What more could have been said in order to bring the subject properly before the Secretary of War? And in view of the fact that the Secretary, instead of acting summarily upon said application (sixth finding of fact, Appellants' Abstract of Record 36) (Record, 6–7) "directed that a public hearing be had on the subject before Major W. L. Fisk, major, corps engi-

neers, U. S. A., at Portland, Oregon, with the view of ascertaining *whether such change in said harbor lines as prayed for by defendant,* and whether his prayer, *for permission to extend his wharf beyond the harbor line established August* 9, 1892, *should be granted;*" and in view of the further fact (sixth finding of fact, Appellants' Abstract of Record, 36) "that such public hearing was had by Major W. L. Fisk, on August 5, 1898;" and of the further fact that "the public were invited, and at which were a number of the leading business men of the city of Portland, interested in the preservation and protection of the harbor of Portland, and whose views, opinions, and protests were received in writing by Major Fisk, and all of which, together with evidence submitted by Mr. Montgomery with his report, were forwarded to the Chief of Engineers of the War Department, the report of Major Fisk being adverse to such change;" and in view of the further fact "that subsequently, on September 1, 1898, John M. Wilson, brigadier general, Chief of Engineers, U. S. A., made a thorough review of the report of Major Fisk, and transmitted to the Secretary of War the papers in the case" (sixth finding of fact, Appellants' Abstract of Record, 35–37) (Record, 6–7); we say, in view of all these things, and of the final decision made by the Secretary of War granting the prayer of the petition of the respondent in all respects, can it rightfully be said that the pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines (Appellants' Brief, 2), *or* that the *facts* before the Secretary were not sufficient to clothe him with jurisdiction to act as provided in the twelfth section of the act of 1890, *supra?* We confidently submit this court will not undertake to review the action of the Secretary of War, much less to hold that he had no jurisdiction in the premises.

Our Contention.

XVI.

Our contention, therefore, is, in view of what we have said:

First. That the defendant Montgomery has a perfect right to construct his wharf at the place and in the manner he is constructing it, such work being wholly *inside* the harbor lines as re-established and located by the Secretary of War on the twenty-third day of September, 1898; and not any further beyond low-water mark than is *necessary and convenient* for the use and accommodation of vessels navigating said harbor. (Sec. 4227, Hill's Code.) And in strict accordance with the permission granted him by the Secretary of War; and

Second. Though there had been no change in the location of the harbor line at that point by the Secretary of War, and conceding for the argument that the harbor line as established by the Secretary of War on August 9, 1892, is the correct one, even then the Secretary of War had jurisdiction and power under the law (sections 7 and 12, river and harbor act of September 19, 1890) to authorize Mr. Montgomery to construct his wharf *beyond said line*, and this permission has been given by the Secretary of War on Mr. Montgomery's application. Therefore, in any event, or upon any construction of the recent action of the Secretary of War, Mr. Montgomery has authority under and in virtue of the act of Congress just cited, and of the action of the Secretary of War, and of section 4227 Hill's Code, to construct his wharf at the place and in the manner he is constructing it, and neither the State of Oregon, the city of Portland, nor the port of Portland has any jurisdiction or right whatever, either through the courts or otherwise, to restrain or interfere with the construction thereof.

Counsel for defendants in error cite the case of Illinois Central R. R. Co. *vs.* State, 146 U. S., 387. But it is not believed that anything decided in that case can give support to any one of the propositions involved in their contention. The principal question involved in that case was as to the precise character of the ownership of the State in lands under the navigable waters of the great lakes, the court dividing. A majority of the court holding that the title to such lands which the State holds, is one held in trust for the people of the State, that they may enjoy the navigation of the waters and carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties, and that it is therefore a title different in character from that which the State holds in lands intended for sale. While the minority of the judges dissenting—Justices Shiras, Gray and Brown—held to the doctrine that the ownership of the State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant, is as full as such ownership and power to grant in the case of the other public lands of the State. This was the great overshadowing controversy in that case. Of course there were a number of other incidential questions, but we are unable after a careful examination to find that anything decided in that case can be of any avail to the defendants in error in the suit at bar.

The twelfth section of the river and harbor act of September 19, 1890, authorizing the Secretary of War to establish harbor lines, is constitutional.

XVII.

As bearing upon the question of the power of Con-

gress to confer upon the Secretary of War the powers conferred by the twelfth section river and harbor act of September 19, 1890 (26 U. S. Stat., 455) we submit the following propositions:

It is true that the sovereign power to make national laws is vested in Congress, and as a general rule it is a settled maxim in constitutional law that this power can not be delegated, that is, that "power to whose judgment, wisdom and patriotism this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved." (Cooley, Constitutional Limitations, 137.)

But this rule, however, applies only to powers which are *strictly* and *exclusively* legislative, and there is a wide range of subjects which may be regulated by direct legislation, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

See remarks Chief Justice Marshall, Wayman *vs.* Southard, 10 Wheat., 43.

It is, therefore, upon this principle that the provision of the judiciary act, which empowered the Federal courts to adopt rules of practice and forms of procedure, is held to be a valid delegation, although the discretion conferred is *quasi* legislative.

Wayman *vs.* Southard, 10 Wheat., 43.
Southerland St. Const., sec. 68.

So the power of the Secretary of War to prescribe rules and regulations for governing the army, and like authority in the Secretary of the Navy over his department, have been sustained, and within their sphere of action the regulations have the "*force of law.*"

U. S. *vs.* Eliason, 16 Peters, 291.
Gratiot *vs.* U. S., 4 How., 80.

Smith *vs.* Whitney, 116 U. S., 167.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
U. S. *vs.* Ormsbee, dist. ct., southern dist. Wis., May 9, 1896, 74 Fed. Rep., 209.

While the legislature cannot delegate its power *to make a law*, it can make a law to delegate a power *to determine some fact or state of things*, upon which the law makes, or intends to make, its own action dependent.

Field *vs.* Clarke, 143 U. S., 649–693.
Locke's Appeal, 72 Penn. St., 491.

The following authorities fully support the proposition that Congress had a constitutional right to confer upon the Secretary of War the powers and duties prescribed by the river and harbor act of September 19, 1890.

United States *vs.* Eliason, 16 Peters, 301.
Gratiot *vs.* United States, 4 How., 80.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Railroad Co. *vs.* Dey, 35 Fed. Rep., 866.
In re Griner, 16 Wis., 447.
United States *vs.* Ormsbee, U. S. dist. ct., southern dist. Wis., decided May 9, 1897, 74 Fed. Rep., 209.
Miller *vs.* Mayor of New York, 109 U. S., 385.
United States *vs.* City of Moline, U. S. dist. ct., northern dist. of Ill., 82 Fed. Rep., 596.
United States *vs.* North Bloomfield Gravel Mining Co., U. S. cir. ct., northern dist. of Cal., 81 Fed. Rep., 253.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.
Fallbrook Irrigation Dist. *vs.* Bradley, 164 U. S., 112.
United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.

In the case of Miller *vs.* Mayor, etc., of New York, 109 U. S., 385, the question as to the constitutional power of Congress to confer upon the Secretary of War the duties, or similar duties, to those conferred upon him by the river and harbor act of September 19, 1890, came up for consideration by the Supreme Court of the United States.

In that case, Congress had passed an act (15 Statutes U. S., 336) authorizing the construction of a bridge over the East river, between the cities of New York and Brooklyn, and declaring that when completed it should be a lawful structure, etc. The second section was as follows:

"That the Secretary of War is hereby authorized and directed, upon receiving the said plan and map and other information, and upon being satisfied that a bridge built on such a plan and at said locality will conform to the prescribed conditions of this act, not to obstruct, impair or injuriously modify the navigation of said river, to notify said company that he approves the same, and upon receiving such notification such company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the Secretary of War approve the plan and location of said bridge, and notifies said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the Secretary of War."

It was contended by the plaintiff in that case, who sought to restrain the building of the bridge, that Congress could not leave it to the Secretary of War to determine whether the proposed construction would be an obstruction to the navigation of the river, but the court answered in this language:

"By submitting the matter to the Secretary, Congress

did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of the legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. South Carolina *vs.* Georgia, 93 U. S., 13."
Miller *vs.* Mayor, etc., New York, 109 U. S., 393.

The Supreme Court of the United States in Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S., 112, said:

"Legislative power is not delegated by enacting conditions upon the performance of which the irrigation district shall be regarded as organized within the boundaries fixed by a board of supervisors after a hearing and vote of electors therein in favor of the incorporation."

It was said by the supreme court of the State of Indiana, in State *vs.* Gerhardt, 145 Ind., 439 (44 N. E. Rep., 469):

"That an act allowing a majority of voters of a township or ward by a remonstrance to prevent the granting of licenses to sell intoxicating liquors, is not unconstitutional as permitting them to suspend the operation of a general law."

The river and harbor act of September 19, 1890, conferring certain powers on the Secretary of War, has been held to be constitutional by Judge Grosscup, in the circuit court of the United States for the northern district of Illinois.

In the case *supra* of the United States *vs.* City of Moline, 82 Federal Reporter, 596, *supra*, Judge Grosscup, after citing the case of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, where it was held that inasmuch as the bridge had been fixed by an act of Congress, and was therefore a lawful structure, it was not within the power of Congress to delegate to the Secretary of War power to change such status, but that such power to change, whatever it might be, was exercisable only by Congress itself, and the case of The United States *vs.* Rider, 50 Federal Reporter, 406, where the court (Judge Sage) held that the notice given to provide a draw-span in the bridge was unreasonable, *held* that the river and harbor act of September 19, 1890, conferring power and imposing certain duties upon the Secretary of War, is constitutional.

In the case of Chicago & Northwestern Railway Co. *vs.* Dey *et al.*, railway commissioners, the circuit court of the United States for the southern district of Iowa, held:

"That the provisions of the act of the Iowa legislature of April 5, 1888, to regulate railroad corporations and other common carriers, and to increase the powers and further define the duties of the State board of railroad commissioners, and to prevent and punish extortion and punish unjust discriminations, which authorizes said board to make and enforce a schedule of rates for railroad charges, are not unconstitutional as an attempted delegation of legislative power."

Chicago & Northwestern Railway Co. *vs.* Dey, 35 Fed. Rep., p. 866.

In a still later case, that of the United States *vs.* Romard *et. al.*, circuit court for the southern district of New York, decided August 4, 1898, 89 Fed. Rep., 156, the court held that the act of Congress of June 22, 1888, as amended by the act of August 18, 1894, which prohibits the deposit of refuse and other material within the harbor of New York and other waters, within limits prescribed by the supervisor of the harbor, and which commands that such material be deposited only within limits defined in a special permit, does not unlawfully delegate any portion of the power of Congress over navigation and commerce. The court in that case, after referring particularly to the facts and the law as applicable, said:

"With the same purpose, harbormasters are authorized to designate the place of anchorage of ships, and locate and shift locations as the conditions of shipping in the harbor require. Obviously, the two Houses of Congress and the Executive could not take an immediate oversight of the dumping of scows, directing the deposit in one place or another, as the exigencies of the day or hour demanded, and no general law could meet the mischief sought to be avoided; hence the mere detail of protecting the harbor was committed to a subordinate officer."

To the same effect are the following cases:

State *vs.* Railroad Co., 37 N. W. Rep., 782.
State *vs.* Railroad Co., 35 N. W. Rep., 118.
Tilley *vs.* Railroad Co., 5 Fed. Rep., 641.
Stone *vs.* Trust Co., 116 U. S., 307.
State *ex rel. vs.* George, 22 Oregon, 142.

The following cases having reference to the powers of the Secretary of War to makes rules and regulations in regard to the army and the management of canals, are analogous, instructive, and conclusive.

In case *In re* Griner and others, 16 Wisconsin, 447, the supreme court of that State held that an act of Congress giving the President power to make all necessary rules and regulations to carry into effect the law for calling out the militia is not a delegation of the legislative power of Congress, the court saying:

"The making by the President of rules and regulations for calling forth and drafting the militia is not an exercise of a power *strictly* and *exclusively* legislative. A distinction exists between those important subjects which must be entirely regulated by Congress, and those of less necessity, in reference to which a general provision made and power is given to those who act under it to fill up the details as incidental to its execution.

In the case of The United States *vs.* Ormsbee, 74 Fed. Rep., 209, the district court of the United States for the southern district of Wisconsin, held May 9, 1896:

"That the grant by Congress by the act of August 17, 1894, to the Secretary of War, of authority to proscribe such rules and regulations for the use, administration, and navigation of canals, etc., owned or operated by the United States, as in his judgment public necessity may require, *was not invalid as a delegation of legislative power;* and the

rules made pursuant thereto have the force of law, so that persons violating the same by drawing off water from the canal are subject to criminal punishment under the provisions of the same act."

There are on the statute books to-day almost innumerable cases of Congress conferring upon the Secretary of War powers very similar to that conferred by the twelfth section of the act of 1890, *supra*. For instance, in the deficiency act of March 9, 1891 (26 U. S. Statutes at Large, pages 800–868), there is the following provision:

"That the action of the Commissioners of the District of Columbia in heretofore granting permits for the extension of any building or buildings, or any part or parts thereof, in the city of Washington, in the District of Columbia, *beyond the building line*, and upon the streets and avenues of said city, is hereby ratified, without prejudice, however, to the legal rights of the Government in the event of destruction by fire, or otherwise, of any such structure. And hereafter no such permits shall be granted, except upon special application, and with the concurrence of all of said Commissioners *and the approval of the Secretary of War*."

By this section, therefore, the whole power for issuing permits for any building *beyond the established building line* is vested in the Secretary of War. This is but one of many very similar acts that might be cited.

Again, by section 4 of the river and harbor act of August 17, 1894 (Supplement to the Revised Statutes of U. S., vol. 2, page 250), it is provided as follows:

"SECTION 4. That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration and navigation of any or all canals, and similar works of navigation, which now are, or hereafter may be owned, operated or maintained by the United States, as in his judgment public necessity may require. Such rules and regulations shall be posted in conspicuous and appropriate places for the information

of the public, and every person and every corporation which shall knowingly and wilfully violate such rules and regulations, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding $500, or by imprisonment in the case of a natural person, not exceeding six months, in the discretion of the court."

This is the section held to be constitutional in U. S. *vs.* Ormsbee, 74 Fed. Rep., *supra*.

Another illustration in point is the act of March 1, 1893, to create the California debris commission and regulate hydraulic mining in the State of California.

Supplement to the U. S. Revised Statutes, vol. 2, pp. 95–100.

This act further shows the extent to which Congress legislates upon the subject of navigable waters of the United States.

Respondent's Authorities Reviewed.

XVIII.

Counsel insist (Brief for Appellants, page 1, filed in lower court) that section 12 of the act of Congress of 1890 (27 Statutes, 88), is unconstitutional, and in support of this contention cite the following authorities:

Article X, amendments to the Constitution.

United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178.

U. S. *vs.* Rider, 50 Fed., 406.

County of Mobile *vs.* Kimball, 102 U. S., 699, 702.

Gilman *vs.* Philadephia, 3 Wall., 726.

Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.

Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196.

U. S. *vs.* Bailey, 1 McLean, 240.

Mining Debris cases, 9 Sawyer, 497.

We will carefully consider each of these authorities and their bearing respectively upon the propositions submitted.

It is conceded, of course, that in virtue of the tenth amendment to the Constitution of the United States, all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. Upon this proposition there can be no controversy between counsel and ourselves.

Now as to the case of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, a careful examination of that case will develop the fact that the question involved was simply this: That where Congress has authorized the construction of a bridge over navigable waters of the United States, the same to be constructed according to certain plans, and a certain height, and with certain spans, and the same *has been so constructed*, that then a subsequent general act of Congress authorizing the Secretary of War to declare bridges to be an obstruction to navigation, and authorizing him to direct a change in their construction, or their total removal, to be followed by a penalty after notice in the case of refusal, *cannot apply to a bridge so previously constructed under a specific act of Congress.*

The decision of the court in that case was not to the effect, as stated by counsel in their brief, that the act of Congress of 1888 conferring these powers upon the Secretary of War was unconstitutional, but was simply to the effect that the act did not apply to a case where the bridge had been previously constructed in strict accordance with the plans and specifications authorized by a specific act of Congress.

The authority, therefore, it will be seen at a glance, has no possible bearing upon the question as to the constitutionality of the twelfth section of the act of Congress of 1890 now under consideration.

The decision in the case of United States *vs.* Rider, next cited by counsel in their brief in support of the unconstitutionality of the act of 1890 (50 Fed. Rep., 406), is based wholly upon the case of United States *vs.* Keokuk & H. Bridge Company, 45 Fed. Rep., *supra*, and is in all respects a parallel case, except that the bridge in this latter case sought to be interfered with had been constructed previously by virtue of a grant from the State of Ohio under an act of the legislature of that State of March 25, 1870, the bridge being over the Muskegon river. The extent of the holdings in the two cases being simply that the authority conferred upon the Secretary of War did not authorize him to interfere with bridges *then legally constructed*.

The next case cited by counsel in support of the unconstitutionality of section 12 of the act of 1890, is that of the county of Mobile *vs.* Kimball, 102 U. S., 691. This case, like the other, not only has no possible bearing upon the question of the constitutionality or unconstitutionality of the twelfth section of the act of 1890, but is a case directly in line in support of the contention of the plaintiff in error in this case; the court holding in that case, opinion by Mr. Justice Field, that the power conferred upon Congress by the commerce clause of the Constitution is *exclusive*, so far as it relates to matters within its purview, which are *national* in their character and admit of, or require *uniformity of regulation affecting all the States;* that that clause of the Constitution was adopted in order to secure such uniformity against discriminating State legislation.

The court held further that commerce with foreign

countries and among the several States, strictly construed, constitutes intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities, and to regulate it as thus defined there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe. That Congress by its non-action in such matters virtually declares that for the time being, *and until Congress deems fit to act*, the State may legislate touching matters *either local* in their nature or operation, or intended to be *mere aids to commerce*, for which special regulations can more effectually provide, such as harbor pilotage, beacons, buoys, and the improvements of harbors, bays and navigable rivers within the State, if their free navigation under the laws of the United States be not thereby impaired. The court therefore held in that case that the act of the State of Alabama entitled, "An act to provide for the improvement of the river, bay and harbor of Mobile," approved February 16, 1867, was not in conflict with the Constitution, *as it was not in antagonism with any act of Congress on the same subject.*

The next case cited by counsel in brief in court below is that of Gillman *vs.* Philadelphia (3 Wallace, 713): This case, like the others quoted, holds to the doctrine that, in the *absence of the exercise of jurisdiction upon the part of Congress*, a State may regulate commerce over navigable waters of a river wholly within the State; but to use the language of the court—

"Congress may interpose whenever it shall be deemed necessary, by either general or special laws. They may regulate all bridges over navigable waters, remove offending bridges and punish those who shall thereafter erect them. Within the scope of their authority both the legislative and judicial power of the nation are supreme."

In that case, which related to the construction of a bridge over the Schuylkill river, in the city of Philadelphia, there had been no exercise upon the part of Congress of its power to regulate commerce upon that river. We are wholly unable, however, to find anything in this case that can give any support whatever to the contention that section 12 of the act of September 19, 1890, is unconstitutional, while the whole theory of the case gives support to its constitutionality.

Again, counsel cite us the case of the Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.

The answer to that authority is simply this: Both the bridge authorized to be built by the State, and the decision of the court referred to, were all prior to the passage of the river and harbor act of 1890, in which Congress took jurisdiction. But, even now, we concede that in so far as the erection of a bridge across the Willamette river is concerned, the State has the right to *authorize* its construction, and also has the right *to construct it*, provided, that after authorizing its construction the plans are submitted to the Secretary of War and receive his approval before the work is commenced. This is the effect of the decision in 165 U. S., quoted by counsel, and so far from being an authority against us is really in our favor, as we have already shown that in the case of the erection of bridges Congress only exercised a *portion* of the power it might have exercised, while in the case of the establishment of harbor lines it exercised the *full power* Congress could exercise under the commercial clause of the Constitution of the United States.

Counsel then cite the case of the Gloucester Ferry Co., *vs.* Philadelphia, 114 U. S., 196. This case has been already cited in our brief in support of our contention. There is nothing in it from beginning to end which will

support the theory of counsel that the act of 1890 is unconstitutional.

Counsel next cite the ancient case of United States *vs.* Bailey, 1 McLean, 234, decided sixty-five years ago, in support of the unconstitutionality of the twelfth section of the act of 1890. The simple question determined in that case was this: That the crime of murder charged against a white man for killing another white man in the Cherokee country, but within the State of Tennessee, could not be punished in the courts of the United States. The court held that while Congress had power "to regulate commerce with the Indian tribes," this power did not authorize Congress to pass a law authorizing the Federal courts to entertain jurisdiction of the case of murder, committed by one white man killing another white man in the Cherokee country, that country at that time lying wholly within the State of Tennessee, and that therefore, the act of 1817 (3 Statutes, 383), which assumed to exercise a general jurisdiction over Indian countries *within a State* was unconstitutional and would have no effect.

McLean, circuit justice, in deciding the case, said:

"Congress have power to regulate commerce among the several States; and if the same power given in the same words in relation to Indians may be exercised as contended, why may not Congress legislate on crimes for the States generally. That Congress have no such general power is a proposition too clear for demonstration. The thing itself is so palpable that it is susceptible of no demonstration. The act in question provides for the punishment of a crime committed by one citizen upon another, wholly disconnected from any intercourse with the Indians."

The decision in that case, while undoubtedly good law, certainly has no application to the questions now before the court. Counsel cite the Mining Debris cases,

9 Sawyer, 441. But here again counsel are unfortunate, as the authority, if it can have any bearing whatever upon the case at bar, is directly against the contentions of counsel for appellants.

Judge Deady, in his concurring opinion with Judge Sawyer, page 547, says:

"By section 3 of the act admitting the State into the Union (19 Statutes 452), it is declared 'that all the navigable waters within the State shall be common highways.' If these words mean anything, the State is thereby restrained from obstructing or authorizing obstructions to the navigation of the Feather and Sacramento, which shall prevent their being used as common highways according to their capacity and condition when the State was admitted."

The opinions of both Judges Sawyer and Deady, from beginning to end, recognize the doctrine for which we are contending.

It must be borne in mind, furthermore, that section 9 of the act of August 11, 1888, which was under consideration and discussed by the courts in the cases of The United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, *supra*, and in case of The United States *vs.* Rider, 50 Fed. Rep., 406, *supra*, was not even a part of the act of September 19, 1890, the twelfth section of which is now under consideration, and it must, furthermore, be perfectly apparent to both counsel and court that there is a very material difference between the character and purposes of the ninth section of the act of August 11, 1888, and the twelfth section of the act of September 19, 1890.

It is true the twelfth section of the act of September 19, 1890, now under consideration, was also the twelfth section of the act of August 11, 1888, and the same was carried forward into the act of 1890, as was also the ninth

section of the act of 1888, both sections being amended in the act of 1890. The ninth section was amended with the evident purpose of eliminating the objections urged in the courts to that section, while the amendment to the twelfth section was made with no such purpose, as that section had never been questioned, and was intended mainly to include, in the character of structures which should not be erected beyond the established harbor lines, except under such regulations as might be prescribed from time to time by the Secretary of War—not only "*piers*" and "*wharves*," as in the original section, but also "*bulkheads* and *other like works*," and also for the purpose of declaring any person who should violate the provisions of the twelfth section guilty of a misdemeanor, and subjecting him on conviction, to a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court.

For the information and convenience of the court we here quote the two sections, 9 and 12, of the act of August 11, 1888, and then quote the same as amended in the act of September 19, 1890. As amended the portions eliminated from the original sections are in parenthesis and *italics*, while the new matter inserted in the amendments are in ROMAN.

Section 9 of the act of August 11, 1888.

"SECTION 9. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge, now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an obstruction to the free navigation of such waters, by reason of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the raft span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary to give notice to the

6127

persons or corporations owning or controlling such bridge to so alter the same as to render navigation through or under it free, easy and unobstructed; and in giving such notice he shall prescribe in each case a reasonable time in which such alteration is to be made. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith apprise the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for this purpose to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act."

25 U. S. Statutes at Large, 424.

Section 9 of the act of August 11, 1888, as amended by section 4 of the act of September 19, 1890.

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge, now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States, is an UNREASONABLE obstruction to the free navigation of such waters (*by reason*) ON ACCOUNT of insufficient height, width of span or otherwise, or where there is difficulty in passing the DRAW-OPENING (*draw-span*) or the DRAW-SPAN (*raft-span*) of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, FIRST GIVING THE PARTIES REASONABLE OPPORTUNITY TO BE HEARD, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it REASONABLY free, easy, and unobstructed; and in giving such notice he SHALL SPECIFY THE CHANGES REQUIRED TO BE MADE, and shall prescribe in each case a reasonable time in which (*such alteration is to be made*) TO MAKE THEM. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith (*apprise*

the Attorney General of the United States, whose duty it shall be to institute suit, in the name of the United States, without delay, in the circuit or district court of the United States for the circuit in which such bridge is located, which court is hereby invested with jurisdiction for those purposes to recover from the owners or managers of such bridge the fines mentioned in the succeeding sections of this act) NOTIFY THE UNITED STATES DISTRICT ATTORNEY FOR THE DISTRICT IN WHICH SUCH BRIDGE IS SITUATED, TO THE END THAT THE CRIMINAL PROCEEDINGS MENTIONED IN THE SUCCEEDING SECTIONS MAY BE TAKEN."

Supplement to the Revised Statutes, vol. 1, 800.
26 Stat. U. S., 453.

Section 12 of the act of August 11, 1888.

"SECTION 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

25 Stat. U. S., 425.

Section 12 of the act of August 11, 1888, as amended by section 12 of the act of September 19, 1890.

"SECTION 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized to cause such lines to be established, beyond which no piers [*or*] wharves, BULKHEADS OR OTHER WORKS shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him.

"AND ANY PERSON WHO SHALL WILFULLY VIOLATE THE PROVISIONS OF THIS SECTION, OR ANY RULE OR REGULATION MADE BY THE SECRETARY OF WAR IN PURSUANCE OF THIS SECTION, SHALL BE DEEMED GUILTY OF A MISDE-

MEANOR, AND, ON CONVICTION THEREOF, SHALL BE PUNISHED BY A FINE NOT EXCEEDING ONE THOUSAND DOLLARS, OR BY IMPRISONMENT NOT EXCEEDING ONE YEAR, AT THE DISCRETION OF THE COURT FOR EACH OFFENSE."

Supplement to Revised Statutes, vol. 1, 803.
26 Stat. U. S., 455.

The case of the United States *vs.* Romard *et. al.*, decided August 4, 1898, by the circuit court for the southern district of New York, 89 Fed. Rep, 156, is directly in point upon the question that section 12 of the act of 1890, *supra*, conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and in support of the constitutionality of such sections.

In that case, Congress, by the act of June 29, 1888, as amended by the act of August 18, 1894 (28 Stat. at Large), sought to prevent the deposit of destructive and injurious deposits within the tide waters of the harbor of New York, section 1, prohibits "the deposit of refuse, dirt, ashes, cinders, mud, sand dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets and sewers, and passing therefrom in a liquid state, in the tide-waters of the harbor of New York * * *." While section 3, requires persons proposing to "take or tow such forbidden matter to a place of deposit, to apply for and obtain from the supervisor of the harbor, appointed hereunder, a permit defining the precise limits within which the discharge of such scows or boats may be made," and any deviation from such dumping or discharging place specified in such permit is declared to be a misdemeanor within the meaning of the act. Romard and others were indicted under this act for dumping at a place other than one of those prescribed in the permit issued by the supervisor of the harbor, and it was contended that while Congress

had power to prescribe such limits, it could not authorize the supervisor of the harbor to fix the same, for the reason, as is claimed in the case at bar, that that would be a delegation of legislative power. The court, however, held differently and sustained the constitutionality of the act.

It was insisted also in that case as in this case that it fell within the principles enunciated in the case of United States *vs.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178, *supra*, but the court, after citing the opinion in the above case said :

" In that case Congress had specifically authorized the bridge company to construct a bridge, and it did not appear that the construction was in violation of the terms of authorization, and the essential holding is that Congress can not delegate to a subordinate discretionary authority to nullify the act and the construction of the bridge pursuant to it. The opinion does not suggest that the United States in its constitutional control of navigable waters can not establish police regulations intended to prevent the deposit of material which would tend to create an obstruction to the waterway, and authorize a governmental officer to supervise the manner of discharging refuse and to designate the location of such deposit."

The court, discussing the case further upon the question as to the power of Congress to confer such powers upon the supervisor of the harbor, said :

" Congress did not thereby delegate to the supervisor any of its powers ' to regulate commerce ' and the included control of the navigable waters of the United States."

United States *vs.* Romard *et al.*, 89 Fed. Rep., 156.

This case is also directly in point upon the question as to the jurisdiction of Congress over the navigable waters of the United States.

This court in Deane *vs.* Willamette Bridge Co., 22 Oregon, 167, said:

"In passing upon the constitutionality of a law, an intent to violate the Constitution is not to be presumed in any case; and every doubt is to be solved, and every intendment given in favor of the constitutionality or the statutes."

Deane *vs.* Willamette Bridge Co., 22 Oregon, 167.

"The decision of a question involving the constitutionality of an act of the legislature," says Mr. Chief Justice Marshall, "is one of the gravest and most delicate of judicial functions; and while the court will meet the question with the utmost fairness when its decision is indispensable, it is the part of wisdom and a just respect for the legislature to waive it if the cause in which it arises can be decided on other points."

Ex parte Randolph, 2 Brock., 448.

Elliott *vs.* Oliver, 22 Oregon, 47.

"While the courts can not shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics; they will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled."

Hoover *vs.* Wood, 9 Ind., 287.

Elliott *vs.* Oliver, 22 Oregon, 48.

Courts in passing upon the constitutionality of a statute must, if there is any reasonable doubt, sustain the statute, without regard to consequences.

People *vs.* Harper, 91 Ill., 357.

Nickerbocker *vs.* People, 102 Ill., 218.

Where the construction of a statute regulating a branch of the public service is doubtful, the court should adopt the construction acted on by the department.

Matthews *vs.* Shores, 24 Ill., 27.

Should the court, therefore, be of the opinion that there is any doubt about the constitutionality of the twelfth section, *supra*, it will adopt the construction of the Secretary of War affirming its constitutionality.

The power of the city or the port of Portland to establish harbor lines ceases when the the National Government acts. There must be no conflict. In this case there is a conflict.

XIX.

But the counsel for defendants in error, while virtually conceding the rightful establishment of the harbor lines on August 9, 1892, by the Secretary of War, insist that the act of the city in also establishing a harbor line is not in conflict with the act of the Secretary of War, for the reason it adopted the same line.

We might concede, and, in fact do, that there was nothing unlawful in the city adopting as the wharf line the harbor line established by the Secretary of War, but we confidently insist that, inasmuch as the only reason why such line was not absolutely inoperative, is because it did not conflict with the line established by the Secretary of War; therefore, whenever the harbor lines were changed by the Secretary of war, as they were, in the exercise of his unquestionable power, on September 23, 1898, then the wharf line established by the city, in so far as it conflicts with such line as relocated by the Secretary of War, must give way. It is impossible that *two* harbor or wharf lines, one established by the Na-

tional Government, and the other by the State government, can exist lawfully in the same harbor at the same time; much less is it possible, under any proper construction of the powers of the respective governments—National and State—that there can be, as insisted by defendants in error in this case, *three* different harbor lines existing at the same time in the same harbor, one established by the National Government, one by the city of Portland, and another by the port of Portland.

If it be true, as contended that the City of Portland, and the Port of Portland, each has jurisdiction and power to establish harbor lines, and if it be true as averred in the bill of complaint, that each has established such lines, the city Dec. 12, 1892, and the port of Portland Nov. 2 1898, then there is nothing to prevent them from establishing *different* and *conflicting* lines, and the fact that they both in this instance adopted the same line—and *that* the line first established by the Secretary of War, is no argument in favor of their jurisdiction or power. If each municipality has power to establish a line, as contended by counsel, then the power exists to establish on *different locations*, and also on lines neither of which may be on the line established by the Secretary of War, and hence we might have *three* different harbor lines, all conflicting.

Counsel for defendants in error insist that the only purpose or effect of the establishment of harbor lines by the Secretary of War is to fix a line beyond which if wharves or piers are built they will be deemed to be obstructions to navigation, and, therefore, a public nuisance, and that therefore, the State, or city acting under the State, or the port of Portland, acting under the State, either one or both, may fix a line *inside* of such harbor line so fixed by the Secretary of War, beyond which a wharf shall

not be built without being deemed in law an obstruction to navigation, and therefore a public nuisance. The contention, if the court please, cannot be maintained for one moment. The idea is based upon an absolutely false assumption as to the purposes of Congress in establishing a harbor line. What are these purposes? They are twofold in character. One purpose, it is true, is to fix a line beyond which wharves, piers, etc., shall not be built, but another equally important purpose is to establish a line sufficiently near the ship channel, or deep water, so as to enable those who are riparian owners or otherwise who have the right to build wharves, docks and warehouses, to connect these wharves, docks and warehouses, with ocean vessels. *This is a regulation of commerce*, and one with which *no State can interfere*. When this line is established, under authority of Congress, no State or city can establish another line which will prevent the building of wharves and warehouses up to the harbor line so established by direction of the General Government. Any other rule would place it within the power of a State to keep open a strip of land and water the entire length of the harbor, between the line established by Congress, and beyond which towards the land ships could not come, and the line thus established by the State or by the city, or the port of Portland, under authority from the State. The wharves, docks and warehouses in the city are as essential adjuncts in the carrying on of foreign commerce as are ships and pilots and sailors. Any legislation that denies the construction of any of these up to the harbor line established by Congress, is in direct conflict, therefore, with what has been done by Congress, and is therefore an attempted interference with the jurisdiction and power of Congress to regulate commerce among the States and with foreign nations, and is unconstitutional and void.

Such a power in the State might prove wholly destructive of the commerce of the city. It cannot be successfully denied that a declaration of the General Government that no wharf or pier shall be constructed beyond a certain established line is not in substance and legal effect a declaration upon the part of Congress that it shall be lawful to construct wharves, piers and warehouses for the benefit of commerce and in the aid of commerce up to such line. And if this is so, what jurisdiction or power has the State to declare that it shall not be lawful to construct these aids to foreign commerce up to such line. And when Congress has declared, as it has done in the act of 1890, that the Secretary of War may authorize and consent to the location of wharves and piers *beyond a certain established line*, what jurisdiction or power, we inquire of the court, has the State to say, either through the city of Portland or the port of Portland, as is claimed by the defendants in error here, that no wharf or pier shall be built within eight, ten, twenty or one hundred feet of such line, much less beyond it? The idea that there can be two harbor lines, or three harbor lines, as is possible under the theory of opposing counsel in this case, established in any city, one by the National Government, the other one or two by the State government, is simply preposterous.

Section 12 of the act of 1890 is a "*regulation of commerce.*" It provides that under certain conditions a certain harbor line shall be established. The Secretary of War is authorized to fix the location of such line. The act of Congress, however, not the Secretary of War, declares that *beyond* that line wharves shall not be constructed. This, it is submitted, is the equivalent of a legislative declaration that it shall be lawful in the interest of interstate and foreign commerce, to construct wharves up to such line, to the end that the ship and

the wharf—as absolutely required by the necessities of foreign and interstate commerce—may come together, in order that *foreign* and *interstate cargoes* may be loaded and unloaded from the one to the other.

Counsel in their brief, paragraph IV, page 3, say: "The mere establishment of a harbor line does not deprive the State of the right to regulate and control navigable waters *within* that line," and one authority only is cited in support of the proposition, that of People *vs.* Williams, 64 Cal., 499.

An examination of this case will show in a moment that it has absolutely no bearing whatever upon the case at bar. The court in that case, page 499, said:

"There is no doubt of the right of a State to control and regulate the use of navigable waters within its boundaries, *subject only to restrictions upon the right arising out of the power of Congress over commerce*, but it is claimed by the defendant that the State has by legislation surrendered its right over the *water highway* in question to the city and county of San Francisco."

Now, in that case there had been no restraint whatever placed upon the right of the State by Congress, and it was simply a question whether the right of the State to regulate the public use of the *navigable waters in question* had been taken away by the establishment of the harbor lines by the State. The court held that it had not, inasmuch as the sixth section of the act establishing the harbor lines provided as follows: "Nothing in this act shall be construed as a surrender by the State of its right to regulate the construction of wharves, or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

The sole point, therefore, decided in that case, was simply this: That the statute of the State of California,

passed March 26, 1851, granting to the city of San Francisco the tide-covered lands known as the beach and water lots, and which established a permanent water front for the city, did not deprive the State, *in the absence of Congressional action*, of the right of regulating the use of the *navigable waters* within the harbor lines thus established.

This authority, therefore, so far from sustaining the contention of the appellants, is an authority which directly supports the theory of the respondent.

Counsel for appellants, in the court below, in their brief, page 3 (Record 166), under subdivision VI, submit the following proposition:

"Said section 12 did not exclude the jurisdiction of the State *inside* the harbor lines fixed by the Secretary in 1898."

One authority only is quoted in support of this proposition. It is Veazie *vs.* Moor, 14 Howard, 574. We will examine this authority and ascertain precisely what bearing, if any it has, in support of the above proposition. The facts as stated in the opinion of the court are as follows:

"The river Penobscot is situated entirely within the State of Maine, having its rise far in the interior of the State. It is not subject to the tides above the city of Bangor, near its mouth, and between the city of Bangor and Old Town, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for milling purposes, and for the above space is not at this time and never has been navigable.

"On the thirtieth day of July, 1846, the legislature of Maine, by a law enacted that William Moor and Daniel Moor, Jr., their associates and assigns, were authorized to improve the navigation of the Penobscot river above Old Town, and for that purpose were authorized to deepen the channel of the river, to cut down and re-

move any gravel or ledge, trees, rocks or other obstructions in the bed thereof; to erect in the bed, on the shore or bank of said river suitable dams and locks, with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river any canal or canals to connect the navigable parts of said river, or, in case it shall be deemed the preferable mode of improvement, by railroads for the like purpose.

"The fourth section of the act provided that if the said William Moor and Daniel Moor, Jr., their associates and assigns, should perform the conditions of the grant as contained in the preceding section, the sole right of navigating said river by boats propelled by steam from said Old Town so far up as they shall render the same navigable, is granted to them for the term of twenty years from and after the completion of the improvement."

The question involved was whether this act of the legislature of the State of Maine was a *regulation of commerce*, within the meaning of that provision of the Constitution of the United States. The court held, according to the syllabus of the case, as follows:

"A State law granting to an individual the exclusive right to navigate the upper waters of the Penobscot river, lying wholly within the limits of the State and separated from tidewater by falls, and impassable for the purposes of navigation, and not forming a part of any continuous tract of commerce between two or more States or with a foreign country, is not repugnant to the Constitution or any law of the United States."

By what process of reasoning the able and learned counsel for defendants in error can make any application whatever of this authority in support of the above proposition, is something, we confess, we are unable to understand.

Counsel at pages 20–21, of their brief, say:

"But it is argued that the city of Portland has no right to establish harbor lines where such lines have been established by the Secretary of War. Admitting for the sake of the argument that the State has no such right *eo nomine*, that is not the question in this case. *Harbor* lines and *wharf* lines are not necessarily identical."

This statement proceeds on the assumption that although the Secretary of War may have power to establish *harbor* lines in the exercise of the power conferred by the commercial clause of the Constitution, that notwithstanding this, while the city has no right *eo nomine* to establish *harbor* lines it has the power to establish *wharf* lines. If the city has this power to establish a *wharf* line, notwithstanding the action of the Secretary of War in establishing *harbor* lines, then the city may locate that line either *on* the *harbor* line, *inside* the *harbor* line or *outside* of the *harbor* line.

Conceding for the present that the city has this power to fix a *wharf* line, notwithstanding the action of the Secretary establishing a *harbor* line, counsel for defendants in error must agree with us that whatever action the city takes in establishing a *wharf* line must be *reasonable*. It must be a line that will not inevitably destroy absolutely the rights of the riprarian proprietor upon the one hand, or of those navigating ships in the harbor on the other. A *wharf* line, therefore, located eighty or one hundred feet towards the land, or inside of the *harbor* line established by the Secretary of War, would have the precise effect intimated above. It would create a lane eighty or one hundred feet between the ships and the wharf, and this fact is of itself conclusive, not only of the *unreasonableness* of such action, but also of the absolute lack of power in the city to establish any wharf line which in any man-

ner conflicts with a *harbor* line established by the Secretary of War. The action of the city, therefore, in establishing such a line everyone must see at a glance would be *unreasonable*. The ships can go no farther towards land than the *harbor* line fixed by the Secretary of War, while the shipper cannot come nearer the water with his produce than the *wharf* line fixed by the city. The result is the commerce of the city is destroyed by reason of the *unreasonable* and *destructive* action of the city in locating the *wharf* line at such a distance inside the harbor line. This all, of course, upon the theory that the action of the Secretary of War in establishing a harbor line is constitutional. And this, if the court please, is precisely what defendants in error insist on doing—that is to say, the right to establish a *wharf-line* eighty-five feet at one point, and running each way to a point *inside* or land side of the harbor line established by the Secretary of War, and *outside* or river side of which wharves cannot be built, thus in the case at bar, leaving a gap of eighty-five feet between wharf and ship.

Counsel Invoke the Police Powers of the State.

XX.

Under subdivision V in brief of respondent in the court below, page 2, counsel say: "To regulate the driving of piles, or the building of wharves within the harbor of Portland, is within the police powers of the city." And several authorities are cited. We will consider each of them.

The first is that of the City of Dubuque *vs.* Stone, 32 Iowa, 84. In that case there was no question whatever of conflict between the Federal and State authority, as the

General Government had never assumed jurisdiction and the court simply held that where a city is authorized by its charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses, and may by ordinance exercise, the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any place other than the wharf so established by the city authorities, without permission of the city and payment of the ordinary wharfage fee.

It is conceded in this case that if Congress had never taken jurisdiction to establish harbor lines in the city of Portland, that then the city could regulate the matter by city ordinance under the provisions contained in its charter.

A reference to the syllabus of the case of Gray *vs.* Frazier, 21 How., 187, cited by counsel at page 2 of their brief, will show at a glance that the case has no possible bearing upon the questions involved. The syllabus is as follows:

"*In the absence of any act of Congress covering the same subject*, the ordinance of a city prescribing for her port at what wharf a vessel may lie, how long she may remain, where she may load or unload, where she may anchor and for what time, and what description of lights she shall display, are valid, *if they do not conflict with the general admiralty law.*"

Thus, it will be seen these local ordinances in order to be valid, must in the first place *not conflict with any act of Congress upon the same subject*, and secondly, they must *not conflict with the general admiralty law.*

The next authority cited is that of Vanderbilt *vs.* Adams, treasurer of the Hospital of the City of New York, 7 Cowen, 348.

In that case the court held that a statute of the State of New York, authorizing harbor masters to regulate and station vessels in the East and North rivers in the city of New York, and imposing a penalty for disobeying their orders or the orders of either, extends to wharves in the hands of private owners, and is not unconstitutional as interfering with private property, or impairing the obligation of contracts.

There was no question involved to the effect that the statute was in conflict with any act of Congress upon the subject of regulating commerce.

Again, the case of Hunt *vs.* Mayor (it should be Hart *vs.* Mayor), 9 Wendell, 570, is cited by counsel.

Here, again, the question involved is entirely different from any question in the case at bar. The controversy being as to the right of an individual, without a grant, to construct and moor a floating storehouse or vessel, for the receiving and delivering out of goods and merchandise, in any bay, river, or in any port or harbor, or any basin or docks thereof, and as to whether in such a case an injunction would lie at the instance of the corporation for the purpose of abating a public nuisance.

Counsel cite the celebrated license cases, 5 Howard, 574. It is difficult to perceive the precise application which counsel would make of these cases, or of the principles involved in them, or the decision of the court, to the case at bar. The questions decided in those were simply these:

In the two cases of Massachusetts and Rhode Island, the court, Chief Justice Taney, following the decision in the case of Brown *vs.* The State of Maryland, 12 Wheaton, 419, held that where the act of Congress authorized a certain liquor to be imported into this country, that no State had a right to levy a tax on such

liquor, or to require a license for the selling of such liquor, so long as the same remains *in bulk in the package unbroken* in which it was imported, or until such package *had been sold by the importer to a third party*, for the reason that the same up to such time was an article of *foreign commerce*, and therefore subject alone to the jurisdiction of Congress. But when the cask or package in which the imported article came into this country was *broken for sale in piecemeal*, or when the package was *transferred to a third party*, that then, in either of such cases, the article imported ceased to be an article of foreign commerce, the power of Congress over the same ceased, and the same was then subject to the State tax or license fee authorizing its sale.

While in the third case it was held that a law of New Hampshire, the effect of which was to prevent the sale, without a license, of a barrel of gin, purchased by the defendant in Massachusetts, and by him imported into New Hampshire, was not repugnant to the Constitution or laws of the United States, for the reason that although when the barrel of gin left the port in Massachusetts, having been purchased there by the defendant and forwarded by him to New Hampshire, it ceased to be an article of *foreign commerce* and became an article of *interstate commerce*, but as Congress had passed no law on the subject relating to *interstate commerce*, therefore the State of New Hampshire had the right to exact a license fee before the defendant could sell his gin. The opinion of the court in that case concludes as follows:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one, for although the gin sold was an import from another State and Congress have clearly the power to regulate such imports under the grant of power to regulate commerce *among the several States*; yet *as Congress has made no regulation*

on the subject, the traffic in the article may be *lawfully regulated by the State* as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to impose."

This decision, therefore, is in direct line with our contention, that in many instances the State may enact laws regulating commerce, either foreign or interstate, where Congress has not legislated on the subject.

The case of the City of New York *vs.* Milne, 11 Peters, 132, 138, cited by counsel, presents an entirely different question from that now before the court. The question in that case was simply whether an act of the legislature of the State of New York, which inflicts a penalty upon the master of a vessel arriving from a foreign port who neglects to report to the mayor or recorder an account of his passengers, was or was not a regulation of commerce, but simply of police, and therefore not in conflict with the Constitution of the United States. A majority of the court held that it was not a regulation of commerce, and therefore the act was valid, although Mr. Justice Story delivered a very able and elaborate dissenting opinion, in which he held that it was a regulation of commerce. But even conceding that it was a regulation of commerce, it was not in conflict with any act of Congress on the subject, as held by a majority of the court, and for that reason was not unconstitutional.

Again, counsel quote in their brief, page 2, the case of Cooley *vs.* The Board of Wardens of the Port of Philadelphia, 12 Howard, 299 (erroneously cited in brief as 12 Wheaton), to support their proposition that the driving of piles, and the building of wharves within the harbor of Portland, is within the police powers of the city.

This is the leading case in which the question was determined for the first time by the Supreme Court of the United States, that the States respectively had the power to pass laws regulating pilots. But upon what was this decison based, and why is it that today the several States have power to pass laws regulating pilots on navigable waters? Simply this: Of course, prior to the adoption of the Federal Constitution, the power to regulate commerce among the States and with foreign nations rested with the States respectively. After the adoption of the Constitution, however, the Congress, on August 7, 1789, by section 4 (5th Statutes at Large, 153) provided as follows:

"That all pilots in the bays, inlets, rivers and harbors and ports of the United States, shall continue to be regulated in conformity with the *existing laws of the States* respectively wherein such waters may be, or with *such laws as the States may respectively hereafter enact for the purpose*, until further legislative provision shall be made by Congress."

It was, therefore, in pursuance of this congressional action that the Supreme Court of the United States held in the case *supra*—first holding, however, that the regulation of pilots on the navigable waters of the United States was a *regulation of commerce within the commercial clause of the Constitution of the United States*—that Congress by the act of 1789, *supra*, had recognized not only the then existing laws of the several States upon the subject of pilotage, but also the right upon the part of the several States to legislate upon that subject in the future. This is the whole of that case. What bearing, we would respectfully inquire of the court, can the decision in that case possibly have upon the one at bar? With all due respect to the able counsel of the other

side, it certainly can have none whatever. But, as has been said of several of the other authorities quoted by counsel, the decision taken as a whole is a direct recognition of the theory urged by us in this case.

In the case of Crandall *vs.* Nevada, 6 Wallace, 35, cited by counsel, the court held that a special tax on railroad and stage companies for every passenger carried out of the State by them, is a tax on the passengers for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the companies, and that the existence of such a power to tax in the States is inconsistent with the objects for which the Federal Government was established, and with the rights conferred by the Constitution on that Government, and on the people, and that the exercise of such a power is accordingly void. The case, so far from supporting the theory of appellants, is just the reverse.

The case of Munn *vs.* Illinois, 94 U. S., 114, next cited in counsel's brief (Record, 46), is what is known as the elevator warehouse cases. And the syllabus of the case indicates clearly that the law of the State was held to be valid for the reason that there was no act of Congress upon the subject with which it came in conflict. The syllabus reads as follows:

"Where warehouses are situated and their business is carried on exclusively within a State, she may as a matter of domestic concern prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate as well as in State commerce, *and until Congress acts in reference to their interstate relations*, such regulations can be enforced, even though they may *indirectly* operate upon commerce beyond her immediate jurisdiction."

The case of Thorpe *vs.* Rutland and Burlington R. R. Co., 27 Vermont, 149, is next cited.

The questions involved in that case were those relating solely to the power of the legislature of the State of Vermont to alter or repeal charters of private corporations, and to pass laws requiring such corporations to maintain cattle guards at all crossings, or to respond in damages for all cattle injured by their trains through such omission.

It is conceded by us that this power exists in every State, and is known and recognized as the police power of the State. That is the power upon the part of the State to legislate for the protection of the public health, the public morals and the *public safety.*

The next case cited by counsel in support of this proposition is that of Boston & M. R. Co. *vs.* The County of York, 79 Maine, 386. (Record, 46.)

The question decided in that case was simply this: That railroad companies may constitutionally be required by the county commissioners of the county of York to build and maintain highway crossings, under the Revised Statutes of the State of Maine, although such liability is imposed by a statute enacted subsequent to the chartering of such companies, and although their charters provide that they are not subject to "*amendment, alteration or repeal.*" This the court held could be done under the police power of the State, and for the purpose of protecting the *lives, limbs and property of the county.*

No question of conflict between the Federal and State law figured in that case, nor was there any principle involved that could be with propriety made applicable to any feature of the case now before the court.

Respondent Montgomery has the right to construct his wharf as far beyond the line of low-water mark as he is constructing it by virtue of the grant in the act of 1862. Hill's Code, section 2447.

XXI.

We concede, as has already been said, that in the absence of any act of Congress taking jurisdiction of the question of establishing harbor lines in this city, the State could establish such lines, and the State of Oregon did, by the act of October 17, 1862, second volume, Hill's Annotated Laws of Oregon, sections 4227, 4228, take jurisdiction in the matter.

By the first of these sections, it will be seen the owner of any land in the State of Oregon, lying upon any navigable stream within the corporate limits of any town, is authorized to construct a wharf or wharves upon the same, *and extend such wharf or wharves into such stream beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may or can navigate such stream.*

Here is a *positive grant* upon the part of the State of a right upon the part of the riparian owner *to extend his wharf beyond low-water mark so as to connect with vessels of all sizes navigating such river.* There is nothing in the act of Congress authorizing the Secretary of War to establish harbor lines, that in any manner conflicts with this section of the statute. Therefore, it stands to-day in full force, in harmony with the act of Congress of September 19, 1890.

The next section, however, of this State law (4228) confers power upon the city to prescribe the mode of exercising this privilege and the *line of low-water mark.*

This section, therefore, is in direct conflict with the seventh and twelfth sections of the act of Congress of September 19, 1890, and must, therefore, give way to the congressional enactment.

But suppose it should be held there is no conflict. Then it is confidently submitted the city has not by this section any right or power to *fix an arbitrary line beyond which such wharf shall not be built.* The only line the city is authorized to establish is the one fixed by section 4227, *supra*, and is a line *beyond low water-mark* so far as may be necessary and convenient for the "*use and accommodation of ships navigating the harbor.*" The question as to what is "*necessary and convenient*" for the *use and accommodation of ships*, is a question of *fact* which the mere declaration of a municipality cannot determine. All the city can do, provided it has any power left under section 4228, *supra*, is to fix a "*line of low water-mark.*"

Hill's Code, sec. 4227.
Hill's Code, sec. 4228.
Yates *vs.* Milwaukee, 10 Wall., 504.

The act of 1862, section 4227, Hill's Annotated Laws of Oregon, grants to the respondent Montgomery as the owner of land lying on the Willamette river, the right to construct his wharf upon said lots lying within the city of Portland, and the further right "*to extend the same into such stream beyond low water-mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream.*

The evidence in this case (see different measurements of depths of water marked on map "Exhibit A," part of answer) shows that the depth of water on the harbor line as re-established September 23, 1898, averages at low water *less than eight feet.*

It appears, therefore, *affirmatively* by, and is absolutely clear from the record in this case, that the respondent has in virtue of the section of the act of 1862, *supra*, the right to extend his wharf at least to this line, that is, the harbor line re-established by the Secretary of War September 23, 1898; and even if under the circumstances of this case the following section of said act, 4228, giving the city the right to "regulate the exercise of the franchise granted" by section 4227, can be construed as still having life, which we deny, there is no suggestion or averment in the bill of complaint that the respondent is either extending his wharf beyond the line authorized by section 4227, or that he is constructing the same in the absence of any regulation by the city.

Inasmuch, therefore, as the respondent has the right by *direct and positive grant from the State* (act of 1862, section 4227, Hill's Code) to extend his wharf beyond low-water mark *so far as may be necessary and convenient for the use and accommodation of any ship or vessel that may or can navigate said river*, the city has no power, whatever, either by virtue of section 4228, Hill's Code, or of the provisions of the present city charter, to fix a line at any place beyond which such wharf shall not be extended, *short of a line "necessary and convenient for the use and accommodation of the largest ships that may or can navigate such river,"* and the record in this case clearly shows *affirmatively* that in order to accommodate such ships, such wharf must be extended at least as far beyond low-water mark as the location of the harbor line established by the Secretary of War in September, 1898. (Record, 126–127.)

It is submitted there is no power conferred upon the city by section 4228, Hill's Code, to establish any line outside of which respondent's wharf should not be constructed. The only line the city is authorized to pre-

scribe by that section, conceding for the argument the section to be still operative, is the "*line of low-water mark;*" but by the *express terms* of section 4227 the respondent has the right to extend his wharf, "*beyond* low-water mark," and not only beyond low-water mark, but beyond it "*so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may or can navigate such stream or other like water.*" (Record, 68; also 125–127.)

Common-law Rights of Riparian Owners.

XXII.

The riparian owner, in the absence of restrictive legislation, has the right in his own interest, as well as in the interest of the public, to connect his shore line by means of wharves, piers or docks, constructed in the shoal or shallow waters immediately bordering upon his land, *with the waters which are navigable in fact.*

Railroad Company *vs.* Schurmeier, 7 Wall., 272.
Yates *vs.* Milwaukee, 10 Wall., 297.
Weaver *vs.* Harbor Commissioners, 18 Wall., 57.
Dutton *vs.* Strong, 1 Black., 23.
Lewis *vs.* City of Portland, 25th Oregon, 133.

In Yates *vs.* Milwaukee, 10 Wall., 498, *supra*, Mr. Justice Miller, in delivering the opinion of the court, said:

"It does not seem to be necessary to decide whether the title of the lot extends to the thread or channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of The Railroad Company *vs.* Schurmeier, 7 Wall., 272, would limit the title to the margin of the stream. But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; *and among these rights are access to*

the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public whatever those may be. This proposition has been decided by this court in the case of Dutton *vs.* Strong, 1 Black, 25, and The Railroad Company *vs.* Schurmeier, just cited. The supreme court of Wisconsin has gone further and asserts that the doctrine that the *title* of the owner of such lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he 'may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable.' Walker *vs.* Shepardson, 4 Wisconsin, 486.

"The riparian right *is property*, and *is valuable*, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

14 amendment Const. U. S.

Yates *vs.* Milwaukee, 10 Wall., 498.

Lewis *vs.* City of Portland, 25th Oregon, 133.

City of Janesville *vs.* Carpenter, 77 Wis., 288.

Rumsey *vs.* N. Y. & New. Eng. R'y Co., 133 New York, 79.

In the Railroad Co. *vs.* Schurmeier, 7 Wall., *supra*, the court held:

"Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making the distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering

on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways. Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

This authority, Yates *vs.* Milwaukee, *supra*, is directly in point on the following propositions involved in the case at bar:

The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

Among these are *free access to the navigable part of the stream*, and the right *to make a landing, wharf, or pier for his own use or for the use of the public.*

These rights are valuable and are *property*, and can be taken for the public use only when *due compensation is made.*

They are to be enjoyed, subject to such general rules and laws as the legislature may prescribe for the protection of the public right *in the river* as a navigable stream.

The decisions of the supreme court of Oregon fully sustain our contention.

But the principles for which we are contending as to the right of plaintiff in error as a riparian owner to construct and extend his wharf *as far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships* has been fully recognized and definitely settled by this court in several cases, notably in Parker *vs.* Taylor, 7 Oregon, 446; Parker *vs.* Rogers, 8 Oregon, 190; Andrews *vs.* Knott, 10 Oregon, 501; Bowlby *vs.* Shively, 22 Oregon, 410, and Lewis *vs.* City of Portland, 25 Oregon, 133.

In these cases every phase of the law relating to the ownership in tide lands, shore lands and lands under tide waters; also of lands under navigable and non-navigable waters, in which the tide does not ebb and flow; and the riparian rights respectively of those owning lands on these several kinds of waters, has been exhaustively and ably discussed by the supreme court of the State of Oregon. And what have been the conclusions, as finally summarized in the latest case—that of Lewis *vs.* City of Portland, 25 Oregon, *supra*—in so far as they bear upon, and have application to, the case now before the court?

They are as follows: *First*—That court gave recognition to the custom which has prevailed from the early settlement of the country in respect to the building of wharves by riparian owners, out to the navigable waters; this, upon the principle *consuetudo pro lege servatur*, and also held, that the legislation of the State upon the subject, justified the conclusion that the State had, in such legislation, also recognized such custom, and affirmatively approved it; and hence it was held in the case of Lewis *vs.* City of Portland, *supra*, (1) That riparian proprietors, on the navigable rivers of this State, who have built wharves out to navigable waters in front of their upland, have rights of property therein which can not be taken for public use, except after due compensation first paid. (2) The object of sections 4227, Hill's Code, which authorizes the owners of land on navigable streams, and within the limits of incorporated cities, to construct wharves thereon, and extend them out to navigable waters so far as convenient and necessary for the use and accommodation of ships, being to encourage the building of wharves in aid of navigation and commerce, therefore, riparian owners on navigable streams within the limits of an incorporated city, who,

before the passage of such section, had built wharves on such upland, and extended them out to navigable water, acquired within the spirit and intent of said section, *property in such wharves*, which can not be taken for public use without just compensation; and *further*, that the riparian owner in such case acquired a *vested right* in such *wharf property* that can not be taken for public use without just compensation.

While it is true the wharf in controversy in the case of Lewis *vs.* City of Portland, *supra*, had been constructed *prior* to the enactment of section 4227, *supra*, yet it is very manifest that no *vested right*, or *property right*, could be acquired, which could not be taken for public use without compensation, unless there was an *inceptive primary right*, as against the State, to construct and extend the wharf to navigable water. No vested right in property can be acquired by a trespasser. No property rights that can not be taken for public use without compensation can be acquired by one who without right or authority enters upon the public domain. The ownership of land below high-water mark on the Willamette river was originally, under the decisions of this court, vested in the State. If then the State has not, either by positive legislation, or otherwise, as by no *negative* legislation and by *acquiescence*, relinquished to riparian proprietors the right to extend their wharves, then such proprietors cannot, by mere appropriation, acquire any vested right therein.

But not only so, all the reasoning, and the entire opinion of Chief Justice Lord in that case, are to the effect, that in the *then* state of legislation on the subject, the owner of lands lying on the Willamette river, within the limits of an incorporated city had a right to extend their wharves beyond low water mark, so far as necessary and convenient for the use and accommodation of

ships or other vessels navigating such. We respectfully submit, therefore, the decision in Lewis *vs.* City of Portland is an authority directly in point as to the right of plaintiff in error, in so far as the State can confer such right to extend his wharf so far beyond low-water mark as may be necessary and convenient for the use and accommodation of ships navigating said harbor, and the State is estopped from making denial of such right. In the case of Lewis *vs.* City of Portland, *supra*, the same counsel represented Lewis, the wharf owner, that now represents the defendants in error herein. If not treading on unprofessional ground, and we only desire to be complimentary, we would respectfully attract the attention of the court to their very able and instructive brief in that case, in favor of the rights of riparian proprietors, on pages 147–149—25 Oregon.

It is clear that in virtue of section 4227, Hill's Code, either *granting irrevocably, or licensing* the riparian proprietor, to extend his wharf beyond the line of low-water mark, so far as necessary and convenient for the use and accommodation of vessels navigating the Portland harbor, and of the proviso in the act of 1876 (Session Laws, 1876, p. 70), which provides: "That the Willamette, Coquille, and Coos rivers shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act. * * * And that the title of this State to any tide, and overflowed lands upon said rivers *is hereby granted* and *confirmed* to such *owner of the adjacent lands*," and in view of the further fact that there is no *restrictive* legislation, it is perfectly clear that the right of plaintiff in error to extend his wharf to *deep water*, can not be questioned by the State, or by any municipality representing the State.

We have insisted elsewhere in this argument that said section 4227, Hill's Code, act of 1862, was a *grant*, and

something more than *a mere license*. Such also it seems was the opinion of counsel for defendants in error when representing Lewis, the wharf owner, in the case 25 Oregon, *supra*. We quote the following from their brief in the case, page 148:

"It was suggested that the act of 1862 (section 4227, Hill's Code) was only a license, and revocable. We think *it grants something more than an ordinary license;* but if it be simply a license, then it has been executed, and a court of equity will not allow a licensor to revoke an executed license without compensation to the licensee. (Washburn on Easements, 3d ed., page 680.)"

So say we; but conceding for the argument that section 4227, Hill's Code, is not, as we claim, and as counsel for defendants in error claimed in the Lewis case, *a grant*, but simply *a license* revokable at the pleasure of the legislature, until acted upon or availed of, it has not as a matter of fact ever been revoked by the legislature, but still is in full force and effect. And the record in this case (bill of complaint, Abstract of Record, 1–9) (Record, 16–20) shows that the rights conferred by this section had, at the commencement of this suit, been accepted, and was being *exercised by the plaintiff in error* by the construction of his wharf, and hence, having been thus acted upon and availed of, the power of the legislature to revoke it is forever gone.

Bowlby *vs.* Shively, 22 Oregon, 420.
Washburn on Easements (3d ed.), p. 680.
Brief of George H. Williams, C. E. S. Wood, S. B. Linthicum and J. Couch Flanders, counsel for Lewis, 25 Oregon, 144–149.

In considering, furthermore, the nature and extent of the rights of riparian proprietors on *the* navigable waters of the Willamette river, the act of the Oregon legislature,

approved October 26, 1870, as amended by act approved October 21, 1876 (Sess. Laws, 1876, p. 70) must not be overlooked. By that act the State *granted* and *confirmed* to all the owners of lands adjacent to the waters of the Willamette, Coos and Umpqua rivers, all the title which the State then had to all *tide* and *overflowed* lands upon said rivers. The act says that these three rivers "shall not be deemed rivers in which the tide ebbs and flows within the meaning of this act," and the State supreme court, in Andrus *vs.* Knott, 12 Oregon, 501, held there were no *tide lands* within the meaning of this act on the Willamette river at the city of Portland. It will be observed, however, the act grants to riparian proprietors not only all *tide* lands but all *overflowed* lands. This court, in Andrus *vs.* Knott, did not pass upon the question as to what constitute *overflowed* lands within the meaning of the act of 1876, or whether there are or are not *any such lands* within the limits of the city of Portland "*adjacent*"—that is the term used in the statutory grant—to the Willamette river. The claim of plaintiff in case Andrus *vs.* Knott, was that the lands in controversy were *tide* lands, not *overflowed* lands. The question, therefore, as to what constitutes "*overflowed*" lands within the meaning of said act is, it is submitted, an open one. That the use of these two designations, "*tide*" and "*overflowed*," by the legislature was not intended as descriptive of but *one* class of lands, that is lands "tide *and* overflowed," but was intended to designate *two* kinds of lands wholly different from each other; the one covered by the *tides*, the other by *overflow*, is perfectly plain. What constitutes *tide lands* is correctly described by this court in Andrus *vs.* Knott, 12 Oregon, 521, as lands "*covered and uncovered by the ordinary tides.*" In other words, "lands which are adjacent to navigable waters, and where the

tide flows and reflows, and which at *high tides are submerged and at low tides are bare.*"

What, then, are the *overflowed* lands granted by the act? We submit they are those lands adjacent to the river which lie between ordinary high and ordinary low-water mark. It is manifest this was the character and description of land intended to be covered by the term "*overflowed lands.*" The act had no reference to lands away from the river. They must be overflowed lands, and lands *adjacent* to the navigable waters of the river, and, as it must be presumed the State intended to grant something, and as that is the only *something* that can be covered by the act, it seems to us that those were the lands to which the grant attaches. We quite agree, therefore, with counsel for defendants in error in the statement contained in their brief in the case of Lewis *vs.* City of Portland, 25 Oregon, 146, in which they say:

"If the land upon which the plaintiff's wharf stands between high and low-water mark is tide land, then it is expressly *granted* and *confirmed* to the plaintiffs (respondent) by section 1 of the act of October 21, 1876, Laws of 1876, page 70, and becomes *absolutely their property.*" And we may say still further that if the land upon which the plaintiff in error is building his wharf is *overflowed* land within the meaning of that act, then also the same is *expressly granted* to him by said act. And this view is also supported by the following statement in counsel's brief, case Lewis *vs.* City of Portland. They say:

"Assuming, then, that under the acts of our legislature and the decisions of the Supreme Court, the Willamette river at Portland is a river in which the tide does *not* ebb and flow within the ordinary meaning of those terms, we refer to the following cases holding that the riparian proprietor has a right to build a wharf extend-

ing into the river for his own use, and for the use of the public, and as far as the necessities of navigation may require: Yates *vs.* Milwaukee, 77 U. S., 10 Wall., 497; The Illinois Central Railroad Co. *vs.* Illinois, 146 U. S., 387. (This, by the way, is the same case now quoted by counsel against us.) Parker *vs.* West Coast Packing Co., 17 Or., 515; Gould on Waters, sec. 179."

Counsel's Brief, case Lewis *vs.* City of Portland, 25–'6 Oregon.

Quarantine Laws.

XXIII.

Counsel in their brief seek to draw an argument from the quarantine laws.

Quarantine laws are necessarily laws for the protection of the public health. Their enactment, therefore, is clearly an exercise of the police power, but it is a police power attaching to the Federal Government as well as the State government. Each may enact quarantine laws, and each, so long as they do not conflict, may be enforced. But if a conflict arises, then the law enacted by the State, *although an exercise of the police power*, must give way to the law enacted by the National Government.

The Supreme Court of the United States in Mo[redacted]n *vs.* Louisiana, 118 U. S., 464, speaking by Mr. Justice Miller, said:

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, *the State laws on the subject will be abrogated, at least so far as the two are inconsistent*, but until this is done the laws of the States on the subject are valid. * * * Quarantine laws belong to that class of State legislation which, whether passed with intent to regulate

commerce or not, must be admitted to have that effect, and which are valid *until displaced or contravened by some legislation of Congress.*"

Morgan *vs.* Louisiana, 118 U. S., 465.

Counsel say:

"The jurisdiction of the State and General Government *are* concurrent. There is nothing extraordinary about this. They are concurrent as to pilotage, inspection, quarantine, and other similar laws for the protection of ships, skippers and sailors."

Counsel, however, neglected in this statement of the law as applicable to this suit, to state a vital and most important proviso, or qualification, to the effect, especially in the case of quarantine laws, that the laws, rules and regulations of the National and State governments, respectively, are only concurrent, and can only be enforced respectively, *when they do not conflict*. When they do conflict then those of the State fall into "*innocuous desuetude*" and are abrogated. As to laws regulating pilots, we have already shown that Congress at its first session in 1789 relinquished its right to the several States.

The Supreme Court of the United States, speaking further of quarantine laws, in Morgan *vs.* Louisiana, 118 U. S., 464, says:

"While it may be a police power in the sense that all provisions for the health, comfort and security of citizens are police regulations, and an exercise of the police power, it has been said more than once in this court, that even where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, *the latter must prevail.*"

Gibbons *vs.* Ogden, 9 Wheat., 1–210.

Henderson *vs.* The Mayor, 92 U. S., 259–272.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650–661.

We readily concede, were it not for the conflict with the action of the Federal Government, that in case it were necessary *as a matter of fact*, in order to preserve and protect the Portland harbor in the interest of commerce and navigation, that the port of Portland could widen the harbor by cutting a channel twenty-five feet deep, for such width as might be *reasonably necessary*, even if such cut extended to the center of respondent's lots, taking 10, 20, 50, or even 100 feet of the dry land, but in such a case to do so the board of commissioners of the port of Portland must proceed in the proper way, that is, by bringing into exercise the power of *eminent domain*, condemning the property thus needed for this public use, and by *making compensation* therefor. In such proceeding the right of trial by jury would be preserved to the respondent, and such jury under direction of the court would be called upon to decide *two* questions: *First*, is the use for which the property is required a *public* one, and *second*, what is the amount of compensation the port of Portland must pay for the property needed for such purposes?

As the matter stands now, the plaintiff in error has by direct grant from the State, as we have already shown (Hill's Code, sec. 4227), the right to extend his wharf beyond the line of low-water mark so far as *necessary and convenient* for the use and accommodation of the largest ships coming to the harbor. This is a *property right*. It is a right Montgomery cannot be deprived of *without just compensation*. He cannot be deprived of it *without due process of law*. Therefore, a court of equity has no jurisdiction or power to deprive him of it, or to restrain him from exercising it until the board of commissioners of the port of Portland at some indefinite time in the future —"*in the near future*," the resolutions of the board say (Abstract of Record, 6)—get ready to widen the channel.

14 amended Const. U. S.
Yates *vs.* Milwaukee, 10 Wall., 498.
And authorities, *supra*.
Art. I, sec. 18, Const. of Oregon.

The learned counsel, it must be presumed for want of something better in the way of argument, enter the realm of philology. On pages 26 and 27 of their brief they say:

"Harbor lines and wharf lines are, or may be, entirely distinct. Etymologically a harbor is a place for ships where they may ride at anchor. A wharf is a landing place for cargoes." (Record, 59.)

Most assuredly a wharf "*is a landing place for cargoes.*"

What is a cargo? The lexicographer says it is the "lading or freight of a ship; the goods, merchandise, or whatever is conveyed in a ship; load, freight."

And consulting Webster further, we find a "*wharf*" defined as follows:

"A perpendicular bank of ground, or timber, or stone and earth, raised on the shore of a harbor, river, canal or the like, and extending some distance into the water, *for the convenience of loading and unloading ships and other vessels.*"

While Bancroft, says: "Commerce pushes its *wharves into the sea.*" And if we may be permitted for a moment to drop into poetry, we might quote from Tennyson:

"Out upon the *wharves* they came,
Knight and burgher, lord and dame."

Taking, then, these different definitions of *harbor* and *wharf*, respectively, does it not follow that the wharf and the navigable waters of the harbor must be brought together? The ship must be able to go to the wharf, otherwise the *cargo*, the goods, wares and merchandise on the ship could not be unloaded on the wharf. But our learned friends contend that, although Congress may, through the Secretary of War, establish a *harbor* line,

beyond which, shoreward, ships may not go, yet the State or city may establish a *wharf* line at any place *inside* such harbor line ten, twenty, yes, eighty-five feet distant, as is claimed in this case, from such harbor line, and beyond which towards the harbor wharves shall not be extended, thus, as we repeat, leaving a gap, or lane, eighty-five feet in width between the ship and the wharf. Such is the glaring absurdity to which the theory of counsel inevitably leads. Such is the argument advanced to sustain the jurisdiction and action of the State against those of the Federal Government.

We cite this as a fair sample of the arguments which the able and learned counsel for defendants in error are compelled to resort to by the necessities of this case. *Ex uno disce omnes; ex pede Herculem.* In this instance, however, the foot disclosed is that of a dwarf rather than that of a Hercules.

Counsel for defendants in error in their brief, page 28, say:

"This court may take judicial notice, because it is a part of the public history of the State that this port of Portland has expended more than $600,000 in the improvement of the Willamette and Columbia rivers." (Record, 60.)

We might reply to this by saying, that this court may take judicial notice, because it is a part of the public history of the State, and also of the operations of the board of commissioners of the port of Portland, *and a fact as well*, that whatever may have been spent elsewhere in the Willamette and Columbia rivers, not a cent, aside from about $2,000 paid a dredger, have they in all the eight years of its existence, expended within the limits of the city of Portland in either harbor or river in either deepening, widening, or otherwise improving the channel or harbor.

Conceding the right of the port of Portland to make any decision affecting the plaintiff in error, such decision is neither conclusive nor binding.

XXIV.

Counsel insist that "the decision of the port of Portland is binding upon respondent." And in support of this somewhat startling proposition we are cited to the following authorities, and these only:

Am. & E. Ency. of Law, page 1046 and cases cited.

Dillon on Municipal Corporations, secs. 832, 836. (Record, 46.)

In this connection let us examine and ascertain what it is *precisely* that the board of commissioners of the port of Portland have *decided*, and which *decisions*, according to counsel's contention, are *conclusive* against Montgomery and everybody else. They decided November 2, 1898:

1. That the wharf line established prior to July, 1898 by the United States engineers, curtails the navigable waters of the Willamette river at the city of Portland to the full extent, which may be done in the interest of the shipping interests of the port.

2. That in order to provide sufficient space and width of channel to accommodate the shipping interests of the port, it will be necessary *in the near future*, to so improve the channel of said river from the steel bridge to the south end of Swan Island, by making it twenty-five feet deep its full width, between the wharf lines established by the United States engineers prior to July, 1898.

3. That to allow any wharves to be extended into said Willamette river within the limits of the city of Port-

land, beyond the wharf lines so established, *supra*, will be to create a lasting damage to this port and the shipping interests thereof. (Record, 40.)

Now, how do these three *decisions*, taken together, affect the property and interests of Montgomery? The "*wharf-line*," as counsel, and also the board of commissioners of the port of Portland in their resolutions call it, established by the "*United States engineers*," as also stated by them, was located along and in front of the respondent's property where the water was and still is at no point two feet in depth, and the average depth of which was and is not one foot. The depth by actual measurement (see map attached to answer, marked "Exhibit A," Abstract, 35), on the line established by the Secretary of War September 23, 1898, at the remotest distance—about eighty-five feet—from the line established by him August 9, 1892, and at greatest depth, is not quite thirteen feet deep, and the average depth of water along said line established in 1898, in front of the respondent's property, is not quite eight feet (see map attached to answer, "Exhibit A." (Abstract, 35 and 39.)

Now, it is an historical fact known to all, this court included, that many ships come to Portland every month in the year drawing, when loaded, from twenty-two to twenty-three feet. And further, that the busiest shipping months in Portland are those when the water is lowest of the year. It is a further fact shown by the record in this case (seventh finding of fact, Abstract, 40) (Record, 9), that the distance opposite respondent's property, between the line established by the Secretary of War September 23, 1898, and that established by him on the other side of the river, August 9, 1892, is about one thousand feet, while the distance across the harbor nearly one mile above is only six hundred feet, and is spanned by a railroad bridge resting on piers. (Record, 9.)

In view, therefore, of these conceded facts, can it be said that the *decisions*, so called, of the board of commissioners of the port of Portland are *reasonable*, much less *true as a matter of fact?* and if *unreasonable* or *untrue as a matter of fact*, then we submit they are not binding on either Mr. Montgomery or any one else.

Counsel say (Brief, 30) it is a reasonable decision because it conforms to the decision of the board of engineers in 1892, and also to the decision of Major Fisk, the United States engineer. There might be some force in this argument were it not for the stubborn fact that both of these decisions have been overruled and set aside because they were *unreasonable*, by both the Chief of Engineers of the United States Army and the acting Secretary of War.

If the port of Portland has, in the interest of the harbor, the right to dig a channel twenty-five feet deep out to a line in front of plaintiff in error's property where the water is less than one foot deep, then for the same reason, they can go five, ten, fifteen or one hundred feet further landward on respondent's property. And in such case will it be contended that Mr. Montgomery could be thus deprived of his property by the mere *ipse dixit* of the board of commissioners of the port of Portland? Such a proceeding would be in plain violation of the fourteenth amendment to the Constitution of the United States which, among other things, provides:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

It would be also in direct conflict with section 18, article I, of the constitution of the State of Oregon which, among other things, provides that "private property shall not be taken for public use * * * without just compensation."

Neither the Decisions of the City of Portland, nor the Port of Portland, are Conclusive.

XXV.

Counsel for defendants in error, in their brief in court below, page 30, say:

"The port of Portland has decided that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct its work in making and widening a channel as required by its act of incorporation, and this *decision is conclusive upon him and upon all the citizens of Oregon.* It is a reasonable decision, because it conforms to the decision of the board of engineers in 1892, and also to the decision of Major Fisk, U. S. engineer in charge of said river, *and there is no appeal from it.* It has the same force and is as binding as an act of the legislature to the same effect." (Record, 61.)

This, it is respectfully submitted, is a most monstrous proposition. Neither the city of Portland, nor the State of Oregon, by a direct statute, could declare that the construction of the wharf, as proposed by Mr. Montgomery, will shoal the navigable waters of the river and obstruct the work of the port of Portland in making and widening a channel as required by its act of incorporation, which would be binding upon Mr. Montgomery and on the courts, or from which there could be no appeal.

"A law is a rule of action prescribed by the supreme power of a State, commanding what is right and prohibiting what is wrong."—Blackstone.

Such a declaration as the above in an ordinance or in a statute is not a *rule of action*, it is not a *law;* it is a *decision* by the legislature, a decision by the municipality, the effect of which is to deprive a man of his property *without due process of law.* Such a

statute or such an ordinance is, as to the *facts* it undertakes to *decide*, open to review by the courts. The State or city might have enacted such a law undertaking to decide *certain facts* as to the effect of the construction of the wharf, and then might have attached a penalty to be imposed by the court on conviction, in case he proceeded to construct the wharf contrary to the decision of the ordinance, and in case of violation by Mr. Montgomery he could have been arrested for a violation of the law. Would it be contended by the learned counsel for appellants that in such case the *facts* decided by the ordinance were not open to review on evidence? Certainly not.

This decision by the port of Portland, while we contend that they had no jurisdiction or power whatever to make any declaration upon the subject or to establish any wharf line, is, in so far as it undertakes to decide facts, a mere *brutem fulmen*.

A statute of a State which confers on a city the power to establish dock and wharf lines and to restrain encroachments and prevent obstructions to such stream, does not authorize it to declare by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when *in point of fact* it is *not an obstruction or hindrance to navigation.*

Yates *vs.* Milwaukee, 10 Wall., 498.

As bearing upon this point, the Supreme Court of the United States, speaking by Mr. Justice Miller, in Yates *vs.* Milwaukee, 10 Wall., 504, says:

"The act of the Wisconsin legislature, approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee rivers, and restrain and prevent encroachments upon such rivers and obstructions thereto. And it is by this statute that the summary proceed-

ings for the removal of the appellant's wharf are supposed to be authorized. *But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character.*"

And the Court proceeding further says:

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposedt o be aggrieved, or even by the city itself. * * * It is true that it is said in the argument that the city council has established a wharf and dock line under the authority of the statute we have cited, and that Yates' dock projects beyond that line. No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it can not be taken into account here. But however this may be, *we are of the opinion that the city of Milwaukee can not, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigable part of the stream and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.*"

Mr. Justice Miller concludes his opinion in this case as follows:

"The decree of the circuit court is therefore reversed, with instructions to enter a decree enjoining the defendants below from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the *actual* improvement of the navigability of the river, and *upon due compensation made.*"

Dutton *vs.* Strong, 1 Black, 25.

The Railroad Co. *vs.* Schurmeier, 7 Wall., 272.

Walker *vs.* Shepardson, 4 Wis., 486.

The legislature can not confer upon a municipality judicial powers. The city, in the absence of Congressional action, may establish a wharf line; and it may pass an ordinance with penalty for disobedience; if not obeyed, it can bring an action to enforce the penalty; the validity of the ordinance can then be tested. It may pass a law to provide for the punishment of any man who obstructs a highway, and providing for its abatement if it is *judicially* determined to be an obstruction, but it can not pass an ordinance declaring *as a fact* that Montgomery's wharf is an obstruction to a highway, which declaration is of itself *conclusive* of such alleged fact, and binding on Montgomery, for that would be an exercise of *judicial* power. That would be depriving a person of his property without a hearing, and *without due process of law.*

Bridge *vs.* Railroad Co., 3 Meerson & Welsby, 244
Davies *vs.* Mann, 10 *id.*, 546.
Mayor of Colchester *vs.* Brooke, 7 Q. B., 339.
Harrower *vs.* Ritson, 37 Barb., 301.
Yates *vs.* Milwaukee, 10 Wallace, 497.
14 amendment Const. U. S.
Art. 1, sec. 18, Const. Oregon.

It is not within the power of any State to declare that a public nuisance which is not so at common law, or which is not so *as a matter of fact.*

Cooley on Constitutional Limitations, 6 ed., 741, note.
Everett *vs.* Council Bluffs, 46 Iowa, 67.
Butchers' Union *vs.* Crescent City, 111 U. S., 746.
Railroad Co. *vs.* City of Joliet, 79 Ill., 44.

The question of a nuisance or obstruction must be determined by general and fixed laws, and it is not to be

tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in such a summary mode and enforce its decision at its own pleasure.

Yates *vs.* Milwaukee, 10 Wallace, 498.

"Whether a nuisance or not," that is, a bridge or pier, "is a *question of fact;* and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it."

Dutton *vs.* Strong, 1 Black., 32.

Whether a particular use of private property constitutes a nuisance is a *judicial* and not a legislative question.

15 A. & E. Enc. of Law, 1178–1180 and note.

Milne *vs.* Davidson, 16 Am. Dec., 195.

Mr. Chief Justice Moore, in Grady *vs.* Dundon, 30 Oregon, 337, said:

"The power to appropriate private property to public use is derived from the Legislative Assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of *certain facts* as a prerequisite to the exercise of such power. The legislature can not dispense with notice of some kind to the owner of the property affected, for to do so would be a violation of the fourteenth amendment to the Federal Constitution, and tantamount to a deprivation of property without due process of law."

Grady *vs.* Dundon, 30 Oregon, 337.

14th amendment to the Constitution of the United States.

2 Kent's Commentaries, 340.

Bridal Veil Lumbering Co. *vs.* Johnson, 30 Or., 205.

The supreme court of the State of Connecticut, in the case of West Hartford *vs.* Water Commissioners, 68 Connecticut, 323 (36 Atlantic Rep., 786), held that:

"The question whether an inhabitant of a town, desiring to obtain water, lives within a 'reasonable distance from the line of main pipes,' within the meaning of the statute requiring the board of water commissioners to furnish water to all residents of said town within that distance, *is a question for the courts to determine*, and the *decision of the board of commissioners is not conclusive or binding*."

The Supreme Court of Oregon, in Smith *vs.* Minto, 30 Oregon, 351, opinion by Mr. Justice Bean, in construing a clause in the present city charter of the city of Portland (Laws 1891, page 823, *et seq.*), held:

"That the power of the city council, in the matter of street improvements is a special one, and must be exercised in strict conformity with the authority conferred. Thus, where a city charter gives the council power to order a street improved *whenever it shall be unsafe*, the street must be *unsafe in fact*, or the improvement will not be binding on the property-owners. *The resolution of the council declaring the street dangerous is not conclusive on the courts.*"

Smith *vs.* Minto, 30 Oregon, 353.
2 Dillon on Munic. Corp., 4 ed., sec. 800.

The principle recognized by the foregoing authorities was adopted by that court in Grossman *vs.* City of Oakland, 30 Oregon, 478, opinion by Mr. Chief Justice Bean, who said (p. 483):

"The charter of the city confers upon it the power to prevent and restrain nuisances and to 'declare what shall constitute a nuisance.' But this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common law or statutory idea of nuisances." Quoting many authorities.

The court proceeding further says:

"By this provision of the charter the city is clothed with authority to declare by general ordinance under what circumstances and conditions certain acts or things injurious to health or dangerous to the public, are to constitute and be deemed nuisances, leaving the *question of fact* open for *judicial determination* as to whether a particular act or thing complained of comes within the prohibited class; *but it can not by ordinance arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such.* (City of Denver *vs.* Mullen, 7 Colorado, 345; 4 A. & E. Corp. Cases, 304; 3 Pac. 693."

Grossman *vs.* City of Oakland, 30 Oregon, 478.

Wharves and docks are as essential to the existence of foreign and interstate commerce, as are harbors and ships.

XXVI.

Mr. Justice Field, in his opinion in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., page 205, says:

"No foreign or interstate commerce can be carried on with the citizens of a State *without the use of a wharf*, or other place within its limits on which persons and freight may be landed and received, and the existence of a power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce, for the use of such places, would be inconsistent with and entirely subversive of the power vested in Congress over such commerce."

The Supreme Court of the United States in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 701, says:

"Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river."

The court proceeding in the case, *supra*, Transportation Co. *vs.* Parkersburg, says:

"Now wharves, levees and landing places are *essential to commerce by water*, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate, and they are *primarily*, at least, subject to the local State laws. Congress has never yet interposed to supervise their administration. It has hitherto left this exclusively to the States. * * * When it shall have done so, it will be time enough for the court to carry its regulations into effect by judicial proceedings properly instituted. But, *until Congress has acted*, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.

"Wharves, quays, piers and landing places for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in the colonial times; and in point of fact the right to build such erections has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time."

This case was decided at the October term, 1882, long before Congress had taken jurisdiction of the subject.

Dutton *vs.* Strong, 1 Black., 33.

Angell on Tide Waters, 196.

In Dutton *vs.* Strong, 1 Black., 25, *supra*, the Supreme Court, in discussing the subject of the erection of wharves and docks, said:

"Wherever the water of the shore, so to speak, is too shallow to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists it is difficult to see any reason

for denying to the adjacent owner the right to supply it; *but the right must be understood as terminating at the point of navigability*, where the necessity for such erections ordinarily ceases."

Again, in the case of Ouachita Packet Co. *vs.* Aiken, 121 U. S., 444, this court held that:

"Wharfage is, *in the absence of Federal legislation*, governed by local State laws." And further: "The case is clearly within the principles of former decisions of this court, which affirmed the right of the State, *in the absence of regulations by Congress*, to establish, maintain and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. * * * Wharfage, the matter now under consideration, is governed by the local State laws. *No act of Congress has been passed to regulate it.*"

In every case decided by the Supreme Court of the United States, prior to the act of 1888, as amended September 19, 1890, taking jurisdiction of harbor lines in the navigable waters of the United States, the court in recognizing the authority of the State has *invariably* held that the National Government had not, at the date of such decisions, respectively, assumed any jurisdiction, and that therefore there was no question as to the right of the State to act. For instance, the court, speaking through Mr. Justice Bradley, in the case of Transportation Co. *vs.* Parkersburg, 107 U. S., 691, said:

"Although wharves are related to commerce and navigation as aids and conveniences, yet, being local in their nature and requiring special regulations at particular places, the jurisdiction and control thereof, *in the absence of congressional legislation on the subject*, properly belong to the States in which they are situated."

We readily concede, and in fact it is universally conceded by the profession, that a city may, if authorized by its charter, in the exercise of the police power of the

State, regulate and even absolutely inhibit the construction and use of any building or business whatever which affects the public health, the public morals, or the public safety.

As was said by the Supreme Court of the United States, speaking of the police power of a State, by Mr. Justice Brown in Lawton *vs.* Steele, 152 U. S., 136:

"Under this law it has been held that a State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars and habitual drunkards; the suppression of obscene publications and houses of ill fame; the prohibition of gambling houses and places were intoxicating liquors are sold."

All of these, it will be observed, come under the one or the other of the three heads, of the protection of the public health, public morals or the public safety.

But we concede there are certain other matters of legislation that come under the police power—that is, where the interests of the public are involved, and where measures are necessary for the protection of the public interests; but "to justify a State in thus interposing its authority in behalf of the public it must appear, *first*, that the interests of the *public generally*, as distinguished from those of a particular class, require such interference; and, *second*, that the means are *reasonable and necessary* for the accomplishment of the purpose, and not unduly oppressive upon individuals. And also that the

means resorted to *in nowise conflict with any Federal law or regulations.* The legislature can not, under pretense of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

In other words, its determination as to what is a proper exercise of the police power is *not final* or *conclusive*, but is subject to supervision by the courts.

Lawton *vs.* Steele, 152 U. S., 137.

The Supreme Court of the United States, in Lawton *vs.* Steele, 152 U. S., 137, in speaking further of the police power, and also as to the non-conclusiveness of the decision of the State as to what is a proper exercise of the police power, said:

"In other words, its determination as to what is a proper exercise of its police powers, *is not final or conclusive, but is subject to the supervision of the courts.* Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be *indefensible* as an exercise of the police power, and to be *void* as interfering with the right of Congress to regulate commerce with foreign nations. Henderson *vs.* New York, 92 U. S., 259. A similar statute of California requiring a bond for certain classes of passengers described, among which were 'lewd and debauched women,' was held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung *vs.* Freeman, 92 U. S., 275. So in Railroad Co. *vs.* Husen, 95 U. S., 465, a statute of Missouri which prohibited the driving of Texas, Mexican or Indian cattle into the State between certain dates in each year, was held to be in conflict with the commerce clause of the

Constitution, and not a legitimate exercise of the police powers of the State, though it was admitted that the State might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In Rockwell *vs.* Nearing, 35 N. Y., 302, an act of the Legislature of New York which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also Austin *vs.* Murray, 16 Pick., 121; Waterton *vs.* Mayo, 109 Mass., 315. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interest."

The first and second assignments of error in court below abandoned in brief and argument.

XXVII.

We take it for granted counsel do not insist on their first and second assignments of error in court below (Abstract of Record, 50) as no mention is made of either in the brief. We, therefore, have not discussed them, as we assume they are abandoned. They relate to the overruling by the court below of the demurrer and motion to strike out.

Neither the city nor port of Portland has, in any event, any right or jurisdiction to excavate, widen and change the location or capacity of the Portland harbor, unless the plan of such proposed work is first submitted to the Secretary of War, and the work has been approved and authorized by him.

XXVIII.

Counsel for appellants in the court below, it seems to us, have been rather disingenuous in their quotation from what they call the seventh (it should be the fourth) finding of fact, which states, among other things, that a copy of the act incorporating the port of Portland was transmitted by the president of said port to the then Secretary of War, etc. Counsel omitted a very important and qualifying portion of that finding. We refer now to their brief filed in the State supreme court. They may present the matter differently here. The quotation of counsel in their brief is as follows:

"Said finding further shows that 'soon after the passage of said act incorporating the port of Portland, a copy of the same was transmitted by the president of said port of Portland to the then Secretary of War, who approved the same; and that the work of the said port of Portland in improving the Columbia and Willamette rivers has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said port of Portland." (Appellant's Brief, 27–28, Record 60.)

Counsel then make upon this finding of fact the following observation:

"We claim that this finding shows that all the juris-

diction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the port of Portland, and that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We now here give the whole of the fourth (erroneously designated as the seventh in appellants' brief in court below) finding of fact bearing upon that point, placing in *italics* that portion of it omitted by counsel for appellants in their statement as above:

"That soon after the passage of said act incoporating the port of Portland, a copy of the same was transmitted by the President of said port of Portland to the then Secretary of War, who approved the same, and that the work of the said port of Portland, in improving the Columbia and Willamette rivers, has been conducted in conjunction with the United States engineers in charge of said rivers, acting under instructions from the Secretary of War, and said engineers have annually reported to said Secretary the nature and extent of said work by said port of Portland. *But there is no evidence in the case showing or tending to show that any dredging or other work of any kind whatever in the improvement of said Willamette river has ever been done by the said port of Portland, on the inside or land side of the harbor line as relocated by the Secretary of War, September 23, 1898, or in the vicinity thereof, either above or below the same, nor that the Secretary of War has at any time suggested or recommended any such dredging or widening of the channel in that locality.*"

In their brief, page 28, counsel for appellants in referring to the act incorporating the port of Portland, section 3 of which is included in the findings, say:

"We claim that this finding shows that all the jurisdiction and power of the State over the Willamette river, including the harbor of Portland, is vested in said corporation, the Port of Portland, *and that the Secretary of*

War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

We submit there is nothing in the record of this case which justifies the broad statement "that the Secretary of War has expressly consented that this corporation shall have the right to widen and deepen the Willamette river at Portland and elsewhere according to its judgment."

But suppose it is true! Where, we inquire of the learned counsel, does the Secretary of War get jurisdiction or authority to so "*expressly*" or even *inferentially*, consent, that the right to improve two among the largest navigable rivers in the United States—one of which separates two States of the Union for nearly four hundred miles, and the improvement of which has by Congress been *expressly* placed under his control—shall attach to a corporation organized under a State law of the State of Oregon? Surely here the argument *delegatus non potest delegare* applies.

It does not appear from anything in the bill of complaint in this case, or any finding of fact, or any evidence, that any plan of the proposed works for widening the Willamette river at the port of Portland, or for excavating so as to change or modify the course, location, condition or capacity of the channel of said harbor, has ever been submitted to the Secretary of War by the port of Portland, much less that the Secretary of War has ever approved or authorized such plan; and yet, it is provided in the latter clause of section 7, of the act of 1890, as amended by the act of July 13, 1892, Supplement to the Revised Statutes U. S., vol. 2, page 30, as follows:

"And it shall be unlawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and

abutments, causeway, *or other works* over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, *under any act of the Legislative Assembly of any State*, until the location and plan of such bridge or *other works* have been submitted to and approved by the Secretary of War, or *to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge*, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless approved and authorized by the Secretary of War."

In view of this section of the act of Congress can it be held that the port of Portland can commence "*to excavate*" or in any manner "to alter or modify the course, location, condition, or capacity of the channel of the navigable waters of the Willamette river at Portland, unless the "*location and plan*" of such proposed "*work*" or "*excavation*" is first submitted to the Secretary of War, and the same is "authorized and approved by him"?

The anomalous condition and character of shore bed and contour and bed of river in front of Montgomery's property demand change of location of harbor line in the public interest.

XXIX.

Counsel say in their brief, page 31 (Record, 61):

"Mr. Montgomery says that the change will save him some expense in dredging. But this is an argument that all the wharf owners in Portland might have made for a change in the harbor lines."

The answer to this is that the record in this case discloses the fact that the conditions, both as to depth of

water, character of formation of shore bed and bed of river in the vicinity where this line was changed, and the contour of the shore line, are wholly anomalous and different from most other places on either side of the river in the city of Portland.

First. It is an historical fact that the most of the wharves and docks located on the west side of the river within the city limits, and which are owned principally by persons who are opposing Mr. Montgomery, were built without any expense of dredging whatever, and into water from twenty-five to thirty feet in depth. In Mr. Montgomery's case it is altogether different. Chief Engineer Wilson, in his report to the Secretary of War (Abstract, 40) finds that the harbor line in front of Mr. Montgomery's property, as established August 9, 1892, runs across "*a bed of hard material which has defied the erosive power of the current during freshets*," and General Wilson says (Record, 9):

"In an engineering point of view, and in the interests of commerce, I cannot believe that any immediate and future material damage will result from granting his (Montgomery's) request." (Record, 9.)

And further, that the desired change will "avoid the expense of removing about 22,000 cubic yards." (Record, 9.)

Again, Hon. Henry Failing in his communication to General Wilson, Chief of Engineers, of date June 23, 1898, which letter is given in full hereafter, in referring to the harbor line in front of Mr. Montgomery's property established August 9, 1892, says:

"The line as established strikes across a point of land where the water is very shallow, and to reach deep water with warehouse and dock would entail a great expense

for dredging and blasting, a *large portion of the material being cement gravel.*" (Record, 155.)

But still further defendant in his answer, which is not denied by any replication, and therefore must be taken as true, says:

"The defendant avers that if restricted in the erection of his wharf to the harbor lines as established August 9, 1892, the cost of dredging, in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river, at, along and in front of defendant's said property consists in a great part of cement gravel, which would require blasting, and defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the water ranges in depth from *three to thirteen feet at one point*, the average depth of water along said line in front of the proposed wharf and warehouse *being not over five or six feet*, he will be compelled to spend a very large amount of money in dredging in the character of ground as stated, in order to enable ships of ordinary draught to come to his wharf at low water."

(Appellant's Abstract of Record, 24: Record, 9-10).

And further Major Fisk in his fourth objection in his report on the case to the Chief of Engineers, concedes the dredging difficulties in front of Mr. Montgomery's property. He says (Abstract, 39, Record, 9, also 38): * * * "Although the dredging at the place under discussion would probably *be in a material harder than in most other localities.*"

Reflections in brief of appellant's in court below, on General Wilson, Chief of Engineers, and Acting Secretary of War Meiklejohn, not warranted by the record.

XXX.

Counsel in their brief say (page 31; Record, 61.):

"He (Montgomery) takes the papers with some letters from his personal friends and goes to Washington. He applies to the Chief of Engineers, who overrules some of the objections of Major Fisk, but does not recommend the change. Mr. Meiklejohn, the acting Secretary (who perhaps never saw the Willamette river) without giving the city of Portland or the port of Portland, or the *chamber of commerce* any chance for a hearing, makes the change."

These statements assume, and counsel would have the court believe, that neither General John M. Wilson, Chief of Engineers of the U. S. Army, nor Hon. G. D. Meiklejohn, acting Secretary of War, considered and determined this controversy on the pleadings and evidence and the report sent up by Major Fisk, but that their decisions respectively were influenced and controlled by outside personal influence of Mr. Montgomery and his friends This is an unwarranted personal reflection, as unjust as it is untrue, on both General Wilson and Secretary Meiklejohn, and the well-known high character, both personally and officially of each of these gentlemen, is an altogether sufficient answer to this libellous innuendo.

The carefully prepared report of General Wilson to the Secretary (Abstract of Record, 38–41; Record, 37–39) discloses the fact that he gave careful consideration to Major Fisk's report, considering *seriatum* each of the ob-

jections, suggested by him, and concluded his report as follows:

"After a careful study of the subject I see no objection to granting this request, other than the establishment of a precedent upon which other applications hereafter may be based. This, in my opinion, is an important objection *for the consideration of the Secretary.*"

It will thus be seen that Chief Engineer Wilson, after considering each of the objections bearing *hydrographically* and *scientifically* upon Mr. Montgomery's application, overruled them all, giving specific, scientific and engineering reasons therefor, but left for the consideration and determination of the Secretary primarily and finally the *sole* objection, as to whether the establishment of a precedent, upon which other applications might be based, should prevail.

The statement of counsel that *Secretary Meiklejohn* "made the change without giving the city of Portland, or the port of Portland, or the chamber of commerce any chance for a hearing" is not altogether free from disingenuousness. General Wilson's report was submitted to the Secretary of War September 1, 1898. The case was pending before the Secretary *twenty-three days*, when on September 23, 1898, it was decided by acting Secretary Meiklejohn. The acting Secretary, moreover, was under no obligations by any law, rule or regulation, either legal or moral, to issue a notice to the defendants in error much less to the *chamber of commerce*, which was in no sense a party to the proceedings. The city of Portland and the port of Portland *were* notified, and appeared and were heard, before Major Fisk by written protests, objections and arguments, all of which were forwarded by Major Fisk to the Chief of Engineers, and by him considered and transmitted to the Secretary of War. If they desired to be heard further, before either the

Chief Engineer or the acting Secretary, either by way of further testimony, protest, arguments or otherwise, whose fault, we would inquire, but their own is it if they were not heard?

Counsels' Change of Base.

XXXI.

The weakness of the case of respondents is fully disclosed by the fact that counsel in their brief and argument before the supreme court of the State almost wholly changed their base and theory contended for in the circuit court.

In the printed brief and argument of counsel upon which this suit was commenced and argued in the circuit court, the *nervus probandi* relied on to sustain the jurisdiction of the State, and the action of the city and port of Portland thereunder, was, "inasmuch as the Willamette river is wholly within the State of Oregon, therefore, the State has *exclusive* jurisdiction." In that printed brief and argument counsel said:

"The Willamette river is exclusively within the State of Oregon. Numerous decisions have been made by the Supreme Court of the United States as to the jurisdiction of a State over the navigable waters exclusively within its lines."

And in order to sustain this proposition the following authorities were cited:

Wilson *vs.* Blackbird Creek Marsh. Co., 2 Peters' 242.

Withers *vs.* Buckly *et al.*, 20 How., 84.

The Willamette Iron Bridge Co., *vs.* Hatch, 125 U. S., 1.

The Passaic Bridges, 3 Wall., 782.

Gilman *vs.* Philadelphia, 3 Wall., 724.

Pound *vs.* Turk, 95 U. S., 459.
Huse *vs.* Glover, 119 U. S., 543.
Sands *vs.* Manistee River Imp. Co., 123 U. S., 288.

But in their printed brief in the Supreme Court of the State (Record, 44-62), this position seems to have been wholly abandoned, and not one of the authorities, *supra*, except the single case of Willamette Iron Bridge Co. *vs.* Hatch, is either cited or referred to. While on page 12 of their brief in the Supreme Court (Record, 51) counsel say:

"Counsel in the court below cited numerous cases, commencing with Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 251, and coming down to Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 203, to show that whenever and wherever Congress has establish regulations of commerce the State has no right to interfere."

The fact is, counsel for plaintiffs having cited the case of Wilson *vs.* Blackbird Creek Marsh Co., *supra*, as their first authority to sustain their proposition, *supra*, we cited, examined and discussed the case in our brief and argument in the court below, for the purpose of showing that the case, so far from sustaining the proposition of counsel for appellants in the State Supreme Court, was in full support of the theory claimed by us; and counsel for appellants have evidently become satisfied that this is so, for they have neither cited it, nor made any reference to it whatever, except as above, in their brief and argument in the Supreme Court.

Counsel in their brief, page 17, say:

"The State does not wish to prevent the construction of a wharf by Mr. Montgomery. All that it proposes to do is to regulate the size of his wharf, so that its river front shall conform to the other wharves in the city. We submit that this is a reasonable and just regulation." (Record, 54.)

The trouble, however with this effort upon the part of the State to make the river front of Montgomery's wharf conform to the other wharves in the city is that a higher power than the State, the National Government, has already done so.

Respondents are estopped from denying the jurisdiction of the Secretary of War to establish harbor lines.

XXXII.

It is respectfully submitted, respondents are by their pleadings estopped (paragraph III, bill of complaint) from insisting that the Secretary of War is without jurisdiction to establish the harbor lines in the Portland harbor. In the bill of complaint they make the following averment:

"On the ninth day of August, 1892, the *United States engineers* established wharf lines in the Willamette river within said city of Portland."

Bill of Complaint, paragraph III, abstract 2 (Record 16).

And further in paragraph IV, bill of complaint, abstract 2, they aver that "the city on December 12, 1892, established wharf lines in conformity to and coincident with the wharf lines *established by said United States engineers* as aforesaid.

And further, they aver in said bill of complaint, paragraph VII (Abstract 6) that the port of Portland on November 2, 1898, established and fixed wharf lines of the port of Portland on both sides of the Willamette river, "the same as that heretofore and prior to the first day of July, 1898, *established by the United States engineers.*"

It will be seen, therefore, defendants in error base their claim at the very outset on the *wharf lines established by*

the National Government. There is, moreover, no averment or claim in the bill of complaint to the effect that the Secretary of War was without jurisdiction or power to establish harbor lines.

A Legal Boomerang Proposition.

XXXIII.

Counsel insist all through their brief and argument (Brief, 25 and 29) that while the State may not have any jurisdiction on the *outside* of the harbor line established by the Secretary of War, that its jurisdiction *inside* such line is not open to dispute.

They further insist that the only true wharf lines, if any, ever established by the Secretary of War, or, as they term it, "*wharf lines established by the United States engineers*" (bill of complaint, paragraph III, Abstract 2), are those established August 9, 1892. Then they say in their brief, page 24:

"We admit for the sake of the argument that the State has no right to obstruct the river *outside* of the harbor lines fixed by the Secretary of War, but otherwise it has an absolute right to protect the channel and fix the dimensions of its harbor according to its own judgment." (Record, 58.)

If, then, the harbor line established by the Secretary of War August 9, 1892, is the only real harbor line established by him, and if, as contended by counsel, he had no right to change the same in September, 1898, then by what right can the city or the port of Portland interfere *outside*, or on the river side, of said line? They admit in their argument, as also in the bill of complaint, that the Secretary of War, through the United States engineers, established this line August 9, 1892. They admit they have no jurisdiction *outside*, or on the river side, of

said line, but only on the *inside*, or land side, of said line; and yet their only complaint of Mr. Montgomery is on account of what they allege he is doing on the *outside*, or river side, of said line, where they concede the State has no jurisdiction.

It is submitted this argument upon the part of counsel for the respondents involves what might be properly termed a compound *non sequitur*. We attract the attention of the court to the recent decision of this court in case of the Lake Shore and Michigan Southern Railroad Co. *vs.* State of Ohio; opinion by Mr. Justice Harlan, 173 U. S.

This case supports in several respects the views we have urged in this case.

A Recent Case Directly in Point.

The decision of the United States circuit court of appeals, opinion by Circuit Judge Jenkins, in the case of the People of Illinois *vs.* the Illinois Central Railroad Co., reported at page 955 of 91 Federal Reporter, is directly in point in support of our contentions.

In the case of Illinois *vs.* the Illinois Central Railroad Co., 146 U. S., 387, cited by counsel for appellants in the court below and hereinbefore referred to, the Supreme Court of the United States, after holding that a riparian owner on Lake Michigan had the right to maintain piers extending into the lake "*to a point of practical navigability*," directed the trial court by its mandate to determine whether piers previously built extended beyond such point "*having reference to the manner in which commerce in vessels is conducted on the lake.*"

The case came up on this mandate before the circuit court of appeals, seventh circuit, and was decided February 11, 1899.

91 Fed. Rep., 956.

This opinion of the court was delivered by Jenkins, circuit judge, who, in his opinion, says:

"We take it that the riparian right to penetrate the waters of the lake to a point of navigability, which is recognized by the decision of the Supreme Court in this case, *is not a right that is concluded and exhausted by the single exercise of it*, but that the owner has a right at all times to reach the point of practical navigability as it may exist from time to time. The pier that sufficed when the great lakes were navigated by vessels not exceeding one hundred and fifty tons burden would of course be wholly insufficient to meet the demands of commerce at this time, when the waters are ploughed by vessels of 4,000 tons burden and over. The right is a *relative* right, having relation, in the language of the Supreme Court in this cause, 'to the manner in which commerce in vessels is conducted on the lake.' To serve any useful purpose these piers must reach water of sufficient depth to float vessels when laden, and *alongside of which vessels can be conveniently brought to be loaded and unloaded*. A sufficient depth of water to float vessels such as navigate the waters of the lake is essential, and *is a necessary incident of the riparian right that the piers shall penetrate the water to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest*, that are engaged in the commerce of the lakes. Atlee *vs.* Packet Co., 21 Wall., 393; Langdon *vs.* Mayor, etc., 93 N. Y., 151."

Judge Jenkins, further in his opinion, quotes with approval the case of Atlee *vs.* Packet Co., 21 Wall., 393, in which the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

"These structures, wharves, levees, piers and other landing places on navigable rivers, which are built and owned by individuals, and which are projected into the navigable channel of a river, are allowable in a part of the river which can be used for navigation, on the ground that they are *essential aids to navigation itself*. The navigable streams of the country would be of little value for that purpose if they had no places where the vessels

which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. *Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves*, and are to be considered as an important part of the *instrumentalities of this branch of commerce*. But to be of any value in this respect they must reach *so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides*. They must of necessity occupy a part of the stream *over which a vessel could float if they were not there*."

Circuit Judge Jenkins, after quoting from the opinion of Chief Justice Ryan in 46 Wis., 244, further said:

"We think it must be, as stated by Chief Justice Ryan, that the extent of this riparian right is purely a relative question, and is limited only to the line of navigability upon a particular stream or body of water. That line of navigability is *a shifting line*; it is *one thing to-day and quite another thing to-morrow*."

This recent case in the circuit court of appeals, it will be seen, is directly in point, *first*, as to the duty of the Secretary of War under the act of Congress to change the harbor line whenever the circumstances seem to demand it, and, *second*, upon the right of the riparian proprietor to build out to deep water and meet the ships with his wharf.

The dockage and warehouse facilities of the port of Portland are inadequate to meet the demands of foreign and interstate commerce.

XXXIV.

This statement as to the shortage of dockage and warehouse room is supported by the record in this case.

We here give a copy of a communication from the late Honorable Henry Failing to General John M. Wilson, corps of engineers, U. S. Army, which speaks for itself. (Abstract of Record, 42.) This communication was before Major Fisk, General Wilson, and Secretary Meiklejohn when the case was being considered.

"FIRST NATIONAL BANK,
"PORTLAND, OREGON, *June* 23, 1898.

"General JOHN M. WILSON,
"Corps of Engineers, U. S. Army,
"Washington, D. C.

"SIR: I am informed that Mr. J. B. Montgomery of this city has petitioned for a relocation of the wharf line established in front of his property, and that of the Northern Pacific Terminal Company, leased and used by the O. R. R. & Navigation Company. The line as established, *strikes across a point of land where the water is very shallow," and to reach deep water with warehouse and dock would entail a great expense by dredging and blasting, a large portion of the material being cement gravel.* I am naturally opposed to any contraction of the waterway, which would affect the channel injuriously, and I therefore consulted Captain Cleveland Rockwell, who was for some years in charge of the survey here, and who is quite conversant with the river channel. I have not seen Captain Fisk about the matter, as I understand he has already made his report. I have great confidence in Captain Rockwell's knowledge and opinion concerning the matter, and he assures me that the change asked for will not injure the channel, and would be but justice to the owners affected.

"I have been much interested in the erection of *additional warehouse room for wheat storage, especially on the east side of the river*, where the product of the Columbia valley is received. As you may observe, the yield of wheat east of the Cascades has greatly increased, and the experience of last year *has demonstrated the great lack of storage room.* The present year promises a much larger export of grain than from the most abundant crop

of 1897–1898. The O. R. R. & Navigation Company *has been much hampered the past year, because of the lack of storage room, having at times hundreds of flat cars laden with wheat on their tracks* subject to damage, besides loss of use of flat cars. I have had several conversations with President Mohler of the O. R. R. & Navigation Company and other directors of the company, *concerning the necessity for providing further warehouse room, especially on the east side and below the bridges.* I regret that in the absence of Mr. Mohler I am not in possession of the statistics which he has laid before me from time to time, to show the *pressing necessity for more storage room.* It is my impression that Mr. Mohler told me that he had *for long periods over 300 cars of wheat on the track awaiting storage.* I presume the incoming crop will be 500,000 or 600,000 tons for export, and the greater portion of this grain must go into warehouse, pending the loading of ships. All this goes to show that *owners of wharf property ought not to be hampered in the erection of warehouses, and that the public interest is greatly involved.* I do not profess to have any skilled knowledge of the effect of change of line on the channel, but if not found to be injurious, it seems to me that the change asked for should be granted.

"Very respectfully yours,

"(Signed) HENRY FAILING."

This letter of Mr. Failing is concurred in by Mr. Mohler as follows:

"I fully concur with these statements.

A. H. MOHLER,
President O. R. R. & N. Co."

(Record, 192.)

The record also shows a letter, of which the following is a copy, addressed by Mr. Mohler to General Wilson:

"THE OREGON RAILROAD & NAVIGATION CO.,
"PORTLAND, OREGON, *August*, 19, 1898.

"Gen. John M. Wilson, Chief of Engineers, U. S. Army, Washington, D. C.

"GENERAL: I attach hereto a letter from our chief

engineer, Mr. W. H. Kennedy, who has been with this company and a resident of this State for many years.

"The question as to whether the extension of the harbor line is an encroachment or not is a *scientific* one; one which I am not personally able to pass upon. *The necessity for increased storage*, particularly on account of our increased interests in the Pacific Ocean countries, *makes it necessary to enlarge our facilities at this point and utilize all available space.*

"This company operates more ships on the Columbia river *than any other interest*, in fact more than any *two interests*, and it is, therefore, directly interested in not contracting the harbor line so as to interfere with free navigation.

"As I stated before, the question is a scientific one, and I assume Mr. Fisk, who has always been pleasant, courteous and considerate in his dealings with the people and corporate interests along the navigable waters of Oregon, somewhat hesitates to recommend a departure from the harbor lines which have been established by his predecessors.

"This company desires no personal advantage whatever; it is looking to the broader question of sufficient facilities, and if it is shown that the proposed harbor extension is detrimental and injurious, *which would certainly affect our property to a larger extent than others*, this company would not for a moment make the recommendation.

"Yours truly, A. H. MOHLER."

(Record 192—The six letters referred to in eighth sub-division of stipulation referred to on page 192 of record were by mistake omitted from the original printed record, they are, however, all in printed "addition to record," pages 8–14.)

But still further plaintiff in error, in his separate answer (Appellants' Abstract of Record, 23–24), makes the following averment:

"Defendant further avers that one of the purposes of the construction of the wharf by him is to erect thereon

a large and commodious warehouse for the storage of grain for shipment; that the *warehouse facilities for the port of Portland are wholly insufficient in number and capacity to meet the demands of the shippers.*"

(Record, 29.)

This averment is not denied by any replication, therefore, must be taken to be true.

The opinion and decision of the Supreme Court of the State of Oregon are obnoxious to just criticism.

XXXV.

This opinion at the outset concedes the contention of the plaintiff in error, that there is no averment in the complaint to the effect that the proposed extension of the wharf will be an obstruction to, or in any way interfere with the navigation of the river, or with any of the powers or duties of the port of Portland. (Opinion of the court; Record, 172.)

But it is contended by the court that this must be inferred *prima facie*, from the resolutions of the port of Portland forbidding its construction. This is a proposition it is respectfully submitted, which can not be sustained. It is submitted a State statute which confers on a municipality the power to establish dock and wharf lines, and to restrict encroachments, and to prevent obstructions to such stream, does not authorize it to declare, by special ordinance, a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, *when in point of fact it is not an obstruction nor a hindrance to navigation.* And a complaint demanding the removal of a wharf, which, as in this case, fails to aver such wharf is an interference with navigation, *is fatally defective.*

Yates *vs.* Milwaukee, 10 Wall., 498.

As stated heretofore in this brief, Mr. Justice Miller, in Yates *vs.* Milwaukee, *supra*, 504, said:

"The act of the Wisconsin legislature, approved March 31, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee rivers, and restrain and prevent encroachments upon such rivers, and obstructions thereto. And it is by this statute that the summary proceedings for the removal of the appellant's wharf are supposed to be authorized. But the mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such a declaration make it a nuisance *unless it in fact had that character.*"

Mr. Justice Miller, proceeding further in his opinion in this case, said:

"It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.

"It is true that it is said in the argument that the city council has established a wharf and dock line under the authority of the statute we have cited, and that Yates' dock projects beyond that line.

"No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it can not be taken into account here.

"But however this may be, we are of the opinion that the city of Milwaukee *can not, by creating a mere artificial and imaginary dock line hundreds of feet away from the navigated part of the stream, and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.*"

Mr. Justice Miller concludes his opinion in that case, as follows:

"The decree of the circuit court is therefore reversed with instructions to enter a decree enjoining the defendants below from interfering with the plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary, in the actual improvement of the navigability of the river, and upon *due compensation made.*"

Yates *vs.* Milwaukee, 10 Wall., 50.
Dutton *vs.* Strong, 1 Black, 25.
Railroad Company *vs.* Schurmier, 7 Wall., 272.
Walker *vs.* Sheperdson, 4 Wisconsin, 486.
Also, authorities heretofore cited in this brief.

For this reason alone, therefore, it is confidently contended the complaint in this case is fatally defective because of its failure to state facts sufficient to constitute a cause of suit.

But, further, because of undenied new material matter set up in the separate answer of Montgomery, judgment must be in favor of plaintiff in error, and this case should be reversed.

The court below in its opinion makes no note of any of the following facts, all of which *stand confessed in this case*, namely, that the separate answer of Montgomery in this case distinctly and positively avers as follows:

"FIRST. That the harbor lines as located across the property of this defendant by the action of the Secretary of War of August 9, 1892, *were practically on dry land at low water, there not being an average depth of as much as two feet of water along said line, the line running for over seven hundred feet distance in four, three, two and naught feet of water, and at one point on dry ground, at low water.*" (Defendant's answer, Record, 28); and,

SECOND. The answer of defendant Montgomery further avers as follows:

"Defendant avers that if restricted in the location of his wharf to the harbor lines as established August 9, 1892, the cost of dredging in order to obtain the necessary depth of water to enable ships to come to the wharf would be so enormous as to wholly prevent the improvement; that the bottom of the river at and along and in front of the defendant's said property *consists in a great part of cement gravel, which would require blasting;* and the defendant avers, although permitted to construct his wharf up to the harbor line as established by the Secretary of War September 23, 1898, along which the depth of water ranges from three to thirteen feet at one point, the average depth of water along said line in front of the proposed wharf and warehouse being *not over five or six feet*, he will still be compelled to spend a very large amount of money in dredging *in the character of ground as stated*, in order to enable ships of ordinary draft to come to his wharf at low water." (Answer of Montgomery, Record, 29); and

THIRD. The answer of the defendant Montgomery contains the following averment:

"And the defendant further avers that the construction of his said wharf at the place and in the manner he is constructing and intends to complete the same, does not in any respect curtail the navigable waters of the Willamette river at the city of Portland, nor is the same, nor will it be any obstruction to navigation, or to the work of the port of Portland, in making and maintaining a proper depth of water, in so far as the said port of Portland may have any rights in the premises. The defendant avers that the construction of such wharf as planned and being constructed by him, instead of being any injury to the commerce or navigation of the Willamette river at the port of Portland, will be a benefit to the same, and a valuable aid in the carrying on of foreign and interstate commerce at the said port of Portland." (Montgomery's answer, Record 29).

And further, the Court overlooks the fact that no replication was ever filed to this answer or any part of it, therefore, under the statutes of the State of Oregon, and the practice of the State circuit court in which this suit originated, all the *material averments* in the answer, *not denied in the reply*, are taken as admitted. This suit did not originate, it must be remembered, in a Federal, but in a State court.

The Oregon Statutes.

XXXVI.

The following provisions of the Oregon statutes govern in the matter of pleadings in cases at law and in equity, commenced in the circuit courts of that State:

SECTION 64. "The only pleadings on the part of the plaintiff shall be—

(1) The complaint,
(2) The demurrer, or
(3) The reply; and on the part of the defendant—
  (1) The demurrer; or
  (2) The answer."

(Hill's Annotated Laws of Oregon, Vol. 1, page 190.)

SECTION 77. "The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counter claim; or he may, for like cause, demur to one or more of such defenses or counter claims and reply to the residue."

Hill's Code, page 222, section 77.

"When the answer contains new matter, constituting a defense or counter claim, the plaintiff may reply to such new matter, denying specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in

ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer."

Sec. 76, Hill's Code, Vol. 1, page 221.

While section 78 of Hill's Code reads as follows:

"If the answer contain a statement of a new matter constituting a defense or counter claim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages."

In this case the plaintiff in error insisted both in the circuit and supreme courts of the State on judgment on the pleadings for the reasons above stated.

Hill's Code, *supra*, page 223.

The foregoing provisions of the Oregon Code relate to actions at law, while section 389, Hill's Code, page 409, makes these several provisions applicable to suits in equity.

"If new matter is alleged in the answer a failure to reply will be taken as an admission of such new matter."

Schofield *vs.* State National Bank, 9th Neb., 316.
Creighton *vs.* Kellerman, 1st Disn., 548,
Ballanger *vs.* Lantier, 15th Kan., 608.

"The reply must be distinct and specific, so it may be seen clearly what is controverted."

Mattison *vs.* Smith, 19 A. B. B. P. R., 288.

It is clearly manifest, therefore, that for these reasons the defendant in the circuit court, and the plaintiff in error here, was and is entitled to a decree dismissing the bill.

It will be further observed, the court below wholly overlooked and ignored the very important fact that by

the express provisions of the act of the legislature of the State of Oregon (Section 4227, Hill's Annotated Laws of Oregon), Montgomery, as the owner of land lying upon the Willamette river, has the right to construct a wharf into such stream "*beyond low water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

For the convenience of the court, section 4227, Hill's Code, *supra*, is given here in full:

"The owner of any land in this State lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, *and extend such wharf or wharves into such stream or other like water beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

By section 4228 Hill's Code, following the above section, the corporate authorities of a town are hereby given power to "*prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any further into such stream or other water beyond such low water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.*"

It will be seen, therefore, there is no power conferred by this section on the municipality to prevent the land owner from extending his wharf as far beyond such low water line as the municipality may fix as may be "*necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.*"

What is the "purpose expressed in section 4227?" It is "*that the land owner has the right, in view of that fact, to extend his wharf or wharves into such stream beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.*"

Conceding, therefore, the constitutional power of the Secretary of War to fix and change from time to time as he may deem expedient and proper in the interest of foreign and interstate commerce, to establish harbor lines in the harbor at the city of Portland, there can be no serious doubt as to the right of Montgomery to construct a dock at the place and in the manner he is doing; but even conceding the unconstitutionality of section 12 of the river and harbor act, as contended by counsel, and the utter lack of power upon the part of the Secretary of War to establish harbor lines, even then, it is respectfully submitted, defendant Montgomery has a perfect right to construct his wharf at the place and in the manner it is being constructed, and this by virtue of section 4227 Hill's Code, *supra*; as it appears from the record in this case beyond all question, not only by the admitted facts, but by those which are proven, that the defendant Montgomery is constructing his wharf wholly within the provisions of the act of the legislature of Oregon, section 4227, hereinbefore cited.

XXXVII.

The court below, while indicating a leaning toward the unconstitutionality of the act of Congress of September 19, 1890 (26th Statutes at Large, 454, 455), authorizing the Secretary of War to establish harbor lines, hesitates to declare it such.

The court says:

"The question is important and interesting and has

been the occasion of considerable discussion in the Federal courts, although it has never been adjudicated by the Supreme Court of the United States. (United States *vs.* Keokuk & H. Bridge Co., 45 Fed., 178; United States *vs.* Rider, 50 Fed., 406; United States *vs.* City of Moline, 82 Fed., 592; United States *vs.* Romard, 89 Fed., 156.)" (Record, 175.)

And the court then remarks:

"The tendency of the decisions, as we read them, supports the argument that the act is void as an unlawful delegation of authority." (Opinion; Record, 175.)

It is true, I believe, as stated in the foregoing opinion, that the question "has never been adjudicated by the Supreme Court of the United States," but, it is respectfully submitted, the authorities quoted by the court, *supra*, do not justify the statement of the court to the effect that "*the tendency of the decisions supports the argument that the act is void as an unlawful delegation of authority.*"

It is respectfully submitted not one of the authorities quoted by Chief Justice Bean in his opinion, *supra*, gives any support whatever, not the remotest, to the contention that section 12 of the river and harbor act of September 19, 1890, is unconstitutional. I attract the attention of this court to the authorities cited by Chief Justice Bean.

As heretofore stated in this brief, the only question involved and passed upon in the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., 178, *supra*, was this: That where Congress has authorized the construction of a bridge over navigable waters of the United States, the same to be constructed according to certain plans, and a certain height, and with certain spans, and the same *has been so constructed*, that then a subsequent general act of Congress authorizing the Secretary of War

to declare bridges to be an obstruction to navigation, and authorizing him to direct a change in their construction, or their total removal, to be followed by a penalty after notice in case of refusal, cannot *apply to a bridge so previously constructed under a specific act of Congress.* The decision of the court in that case was *not* to the effect that the act of Congress of 1888, conferring these powers upon the Secretary of War, was unconstitutional, but was simply to the effect that the act did not apply to a case where a bridge *has been previously constructed* in strict accordance with plans and specifications authorized by a specific act of Congress.

Again, the case of the United States *vs.* Rider, next cited by the court below, is based wholly upon the case of the United States *vs.* Keokuk and H. Bridge Co., 50 Fed., *supra*, is in all respects a parallel case, except that the bridge in this latter case sought to be interfered with had been constructed previously by virtue of a grant from the State of Ohio under an act of the legislature of that State of March 25, 1870, the bridge being over the Muskingum river. The extent of the holdings in the two cases being simply that the authority conferred upon the Secretary of War did not authorize him to interfere with bridges *then legally constructed.*

The next case cited by the court below in their opinion, is that of the United States *vs.* the City of Moline, 82 Fed. 592, *supra*, and we confess to amazement that the court should cite this case in support of the unconstitutionality of the act referred to, from the fact that an examination of the case will show that the court, Judge Grosscup, held precisely to the contrary, that is, that the river and harbor act of September 19, 1890, conferring power and and imposing certain duties upon the Secretary of War, *is constitutional.* In that case, Judge Grosscup, after citing the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., *supra*, and also the case of the

United States *vs.* Rider, 50 Fed., *supra*, held that the river and harbor act of September 19, 1890, conferring power and imposing certain duties upon the Secretary of War, *is constitutional*.

The next and last case cited by the distinguished court below in support of the unconstitutionality of the river and harbor act referred to, is that of the United States *vs.* Romard, 89., 156; and again the decision in that case is in principle directly in support of the constitutionality of the act referred to, although the decision in that case did not involve the construction of the twelfth section of the act of September 19, 1890, but of the act of June 29, 1888, as amended by act of August, 1894.

In that case Congress, by the act of June 29, 1888, as amended by the act of August 18, 1894 (28 Stat. at Large) sought to prevent the deposit of destructive and injurious deposits within the tide-waters of the harbor of New York. Section one prohibits "the deposit of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets and sewers and passing therefrom in a liquid state in the tide waters of the harbor of New York * * *," while section 3 requires persons proposing to "take or tow such forbidden matter to a place of deposit, to apply for and obtain from the supervisor of the harbor, appointed hereunder, a permit defining the precise limits within which the discharge of such scows or boats may be made," and any deviation from such dumping or discharging place specified in such permit, is declared to be a misdemeanor within the meaning of the act.

Romard and others were indicted under this act for dumping at a place *other* than one of those prescribed in the permit issued by the supervisor of the harbor, and it was contended that while Congress had power to prescribe such limits, it could not authorize the supervisor

of the harbor to fix the same, for the reason, as is claimed in the case at bar, that that would be a delegation of legislative power. The court, however, held differently, and sustained the constitutionality of the act. It was insisted also in that case as in this case, that it fell within the principles enunciated in the case of the United States *vs.* Keokuk and H. Bridge Co., 45 Fed., 178, *supra*, but the court, after citing the opinion in the above case, said:

"In that case Congress had specifically authorized the Bridge Company to construct a bridge, and it did not appear that the construction was in violation of the terms of authorization, and the essential holding is that Congress can not delegate to a subordinate discretionary authority to nullify the act, and the construction of the bridge pursuant to it."

The court discussing the case further upon the question as to the power of Congress to confer such power upon the supervisor of the harbor said:

"Congress did not thereby delegate to the supervisor any of its power to "*relegate commerce*" and the including control of the navigable waters of the United States."

United States *vs.* Romard *et al.*, 89 Fed., 156.

These, therefore, are the four and only cases upon which the court below based the following remark:

"*The tendency of the decisions, as we read them, support the argument that the act is void as an unlawful delegation of authority.*"

We very much fear the distinguished Chief Justice of the Supreme Court of the State of Oregon has failed to read aright the several decisions so quoted by him in support of the above statement.

But the court below, after giving the twelfth section of the river and harbor act of September 19, 1890, this

pierce in the heart with the legal rapier, hesitates to kill it, because in this case, as the court below believes, it was unnecessary to a reversal of the decision of the Circuit Court. (Record, 175; Opinion of Court.)

And the decree of reversal is based solely on what seems to us a most narrow and untenable construction of the act authorizing the Secretary of War to establish harbor lines, and of a misconception as to the effect, in view of the commercial clause of the Constitution, and of the power of the Secretary of War to grant permission to a riparian owner to extend his wharf outside the established harbor line, of the establishment by the Federal Government, of harbor lines in the navigable waters of the United States. It is claimed by the court below that the only effect of the establishment of harbor lines by the Federal Government is to prevent any pier or wharf being constructed beyond or outside of it, *except by permission of the Secretary of War*. (Opinion of Court; Record, 175.)

While we confidently deny that any such narrow construction should be applied to the act in question, or that any act of the Secretary of War under it should be so limited and contracted in its operation, it is respectfully submitted that even under the construction given it by the court below, the decision of the court below can not be maintained, and the same should be reversed; and for the very good reason that the construction of a wharf by Montgomery at the place where it is being constructed, outside in part of the harbor line, as originally established August 9, 1892, is *by the express permission of the Secretary of War*. Conceding, therefore, the construction of the court below to be right, Montgomery is also right, as he comes within the plain provisions of the act authorizing the Secretary of War to give *permission to go beyond the established harbor line*.

(Sec. 7, Act Sept. 19, 1890; 25 Stats., 425.)

Montgomery had the express permission of the Secretary of War to construct his wharf outside of the harbor line as originally established August 9, 1892.

XXXVIII.

The court, by reference to the proceedings before the Secretary of War (Record, 6–11), must come to the conclusion that the very purpose, so expressed in the application, and in all of the proceedings upon the part of Montgomery, in his application to the Secretary of War, was *to enable him to construct his wharf beyond the harbor line as established August 9, 1892.* And the decision of the Chief of Engineers *first*; and then subsequently that of the Acting Secretary of War, were clearly and expressly to the effect *that he could be permitted to do so.*

By a reference to the report of John M. Wilson, Brigadier General, Chief of Engineers, U. S. Army, to the Secretary of War, September 1, 1898 (Record, 8), it will be found that he stated the purpose of the application as follows:

"This is a case of an application of Mr. James B. Montgomery of Portland, Oregon, for a change of the harbor lines at Portland, from those ordered by the Secretary of War August 9, 1892, *so as to admit of the construction of a dock the outer limit of the extreme point of which will be about 85 feet in advance of the present harbor lines.*" (Record, 8–9.)

Proceeding further, General Wilson says:

"The object of Mr. Montgomery, as stated by him, *is to avoid the necessity of the expense of dredging about 22,000 cubic yards of hard material.*" (Record, 8–9.)

General Wilson then takes up and answers the following objections made by the local engineer, namely:

4th. "As to give Mr. Montgomery privileges which others have not asked, through a jealous care of the best interests of the port, and even at considerable expense to themselves, it hardly seems fair, although the dredging at the place under discussion would probably *be in a material harder than in most other localities.*" (Record, 9.)

And, in answering this objection, says:

"The point made, that if this is granted it will be a special privilege not requested by others, is hardly a good one; if others had made similar applications they surely would have expected and demanded courteous consideration of their requests." (Record, 9.)

General Wilson then takes up the fifth objection suggested by the local engineer, which is as follows:

5th. "*The increase in the area of Mr. Montgomery's wharf* brings up the point that if one owner of water-front property is allowed such substantial advantages others might justly advance similar claims." (Record, 9.)

And, answering, says:

"This point," says General Wilson, "is important, and should be carefully considered. If other parties presented similar requests under similar conditions they would receive prompt consideration. In this case the *owner finds the harbor line running across a bed of hard material which has defied the erosive power of current during freshets. To avoid the expense of removing about 22,000 cubic yards, he asks that the harbor line be thrown forward about 85 feet at one point, running back to its original location at points about 700 feet distant on each side.* To comply with his request reduces the distance between harbor lines on opposite sides of the river to about 1,000 feet. Less than a mile above the river is only 600 feet wide, and is spanned by a bridge resting on piers. The slight contraction now asked *cannot throttle the freshets or do any material damage.*

"In an engineering point of view, and in the immediate of future interests of commerce, I cannot believe that any material damage will result from granting this request." (Record, 8–9.)

But not only so. Going back to the original application of James B. Montgomery for permission to construct his wharf beyond the harbor line as originally established, and for a change in said harbor line, as found by the court below (sixth finding of fact, Record, 6–7), which was the finding of the court, and which findings of facts are recognized as correct by the supreme court of the State, we will find the purpose of Montgomery in making the application to be as follows (we quote from the sixth finding of fact, Record, 6–7):

"That on or about May 21, 1898, the defendant, James B. Montgomery, presented his petition to the Secretary of War, in which he claimed that said harbor line, established August 9, 1892, in front of water lots 1, 2, 3, 4, 5, 6, and 7, was *located so far inland, and in many points in water only 6 inches to 2 feet in depth*, and praying that said line in front of said lots, and for a distance as hereinafter described, should be relocated. That the Secretary of War, on receipt of said application of defendant, James B. Montgomery, directed that a special hearing be had on the subject before Major W. L. Fisk, Corps of Engineers, U. S. A., at Portland, Oregon, with a view of ascertaining whether such change in said harbor line, as prayed for by defendant, and *whether his prayer for permission to extend his wharf beyond the harbor line established August 9, 1892, should be granted.*" (Record, 6–7.)

Based upon the opinion of General Wilson, Chief Engineer, U. S. A., on September 23, 1898, G. D. Meiklejohn, then Acting Secretary of War, took action thereon by the following endorsement of the papers in this case:

"WAR DEPARTMENT, *Sept. 23, 1898.*

In accordance with the view of the Chief of Engineers, the request of James B. Montgomery will be complied with.

G. D. MEIKLEJOHN."

(Record, 10.)

And also on the same day said Acting Secretary of War made the following endorsement upon the map accompanying Montgomery's application, and a copy of which is Exhibit "A" attached to Montgomery's answer (Record 26–27):

"WAR DEPARTMENT, *Sept.* 23, 1898.

"The change in the harbor line shown in red hereon is approved.

G. D. MEIKLEJOHN,
Acting Secretary of War."

(Record 10.)

The attention of the court is further called to the further findings of fact in this case as follows (Record 10–11.)

"The court finds that the red line referred to in the foregoing statement of the Acting Secretary of War is the identical line described in the application of the defendant Montgomery, for the change of the harbor line as amended by him at the request of Major Fisk, Corps of Engineers, U. S. A., August 17, 1898."

The eighth finding of fact is as follows:

"8th. That by the action of the Acting Secretary of War of September 23, 1898, aforesaid, the said harbor line was re-established and relocated by the Secretary of War, between Randolph and Russell street extended, on a line formed by an extension to an intersection in front of the defendant Montgomery's said property, of the harbor line established August 9, 1892, in front of the present Montgomery dock, and in front of the Northern Pacific Terminal Co.'s dock, as designated and described on said map Exhibit A, and by the red line thereon, that being the identical line described in the application of defendant Montgomery as amended August 17, 1898, in response to the written request of Major W. L. Fisk, Major, Corps Engineers, U. S. A., as aforesaid." (Record 10–11).

In view, therefore, of all the foregoing proceedings, can there be any question in the mind of this court, that the effect of this whole proceeding was to give to Mr. Montgomery *express permission* on the part of the Secretary of War to construct his wharf *beyond the line as originally established?* And if this is so, what becomes of the contention of counsel of the other side, or of the decision of the court below? And furthermore, can there be any doubt that the effect of these proceedings was to change the established harbor line from that fixed August 9, 1892, to the line as established by the Acting Secretary of War, September 23, 1898?

Counsel in the court below disputed the power of the Secretary of War to change or re-establish a harbor line after it has been once established. We have answered this contention fully heretofore. But in this connection we call the attention of the court to the fact that the court below seems to recognize the rightful relocation by the Secretary of War September 23, 1898. We quote from the opinion (Record, 176), as follows:

"The purpose of the city of Portland is not to interfere with the harbor line relocated by the Secretary of War September, 1898, but to prohibit the extension of wharves and piers beyond a certain line inside thereof. In our opinion, such power and authority still remain in the State, and Congress has not by the act of 1890 assumed to exercise exclusive control over the matter."

In other words, the holding of the Supreme Court of the State of Oregon amounts simply to this, although the change in the harbor line was made for the *express purpose* of permitting Montgomery to extend his wharf *beyond* the harbor line, as *originally established*, yet the State, through the municipality, can come in and say: "No, notwithstanding this was the purpose of this action upon the part of the Federal Government, we, the city, and the port of Portland, representing the State, propose

to nullify the action by declaring that the wharf shall *not* be extended as authorized by the Secretary of War." If this is not a direct conflict between Federal and State authority, in a matter affecting foreign commerce, then we confess we cannot imagine what would be a conflict.

But it is further respectfully submitted that the court below is in error as to the effect of the act of the Secretary of War, in establishing a harbor line in the navigable waters of a harbor located wholly within a State.

The court says:

"Congress has assumed jurisdiction over that point of a harbor outside of a line which the Secretary of War originally established, but it has not, in our opinion, assumed jurisdiction or authority over the space between such line and the shore, nor has it made any provisions directly or indirectly as to the use thereof."

And continuing, Chief Justice Bean says:

"While wharves, piers and landing places are essential to commerce by water, they are nevertheless, in their nature local, attached to the soil and require a diversity of rules and regulations. Full jurisdiction and control over them is vested in the State *in the absence of Congressional legislation upon the subject.*" (Record, 175.)

Most assuredly we concede the State's exclusive control over wharves, piers and landing places or other structures essential to commerce in the navigable waters of a river wholly within a State, *in the absence of Congressional legislation upon the subject.* But is it not a fact that we have legislation upon the subject in the case at bar? When the Federal Government has assumed control of a navigable water, even though the same be wholly within the limits of the State as in the case at bar, and after establishing a harbor line, and after providing not only in substance and effect, but *expressly*, that the Secretary of War may permit the extension of

piers and wharves and bulkheads, or other works *beyond such harbor line* so established, and *outside of the same*, it can not be successfully contended for one moment that there is, in reference to such harbor, an "*absence of Congressional legislation upon the subject*."

The court below proceeding further in the opinion referred to as to whether there has been Federal legislation, says:

"Such legislation can not, we think, be inferred from mere authority given to an executive officer to establish a line in a harbor beyond which it shall be unlawful to extend such structures without his consent." But when we recall the fact that section 7 of the river and harbor act of September 19, 1890, confers upon the Secretary of War power to authorize the construction of a wharf "*outside of an established harbor line*" (section 7, act of 1890, 26th statute, 444–445), it becomes no longer necessary to resort to *inference* as to whether there has or has not been such legislation. By this section, the whole question of the right of a property owner to extend his wharf beyond the harbor line established by the Secretary of War is vested *solely* in the Secretary of War, and the State has no longer any power in the premises. (Record, 175–176.)

Finally, the court below in support of its contention, says:

"This conclusion, we think, finds support in the Lake Shore and Michigan Railroad Company *vs.* Ohio, 165 U. S., 365." It is respectfully submitted, this case in 165 U. S., gives no support whatever to the views and conclusions of the court below, upon the contrary, the only question decided by the court in that case was that the provisions of sections 4, 5 and 7 of the act of September 19, 1892, conferring upon the Secretary of War authority concerning bridges over navigable waterways, do not deprive the States of authority to bridge such streams, but simply grant a remedy to prevent such structures,

although previously authorized, from interfering with commerce. With this decision we have no controversy whatever. As we have pointed out distinctly, heretofore, in this brief, a modicum of power in respect to the construction of bridges is distinctly left by Congressional legislation to the States respectively.

The public interests are vastly subserved by the construction of Montgomery's wharf and warehouse.

XXXIX.

We respectfully insist, in conclusion, that in view of the whole record in this case, the construction of the respondent's wharf and warehouse, at the place and in the manner he is constructing the same, so far from being an injury, is a *positive benefit to the harbor and to the commerce and shipping interests of the port.* There is a great shortage of warehouse room, as appears from the record, especially on the east side of the river (Record, 156–147), and Montgomery, so far from being characterized as sacrificing the public interests to satisfy his personal greed (Brief of Appellants, 32) should, for the public spirit he is manifesting by the expenditure of $50,000 or more, to enlarge and improve the warehouse and shipping facilities of the port, be commended as a public benefactor. The public interests are not promoted by restricting the wharfage and warehouse facilities of the port of Portland, and by centralizing the same in the hands and under the control of the few, and thus placing the shipping interests of the port at the mercy of a trust and, therefore, an unconscionable monopoly.

The public interests generally, and especially do the interests of *foreign* and *interstate* commerce, require adequate wharfage and warehouse accommodations, quite

as much as they do a deep channel and capacious harbor.

We respectfully insist the decree of the Supreme Court should be reversed, and that of the Circuit Court affirmed, with costs and disbursements.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.